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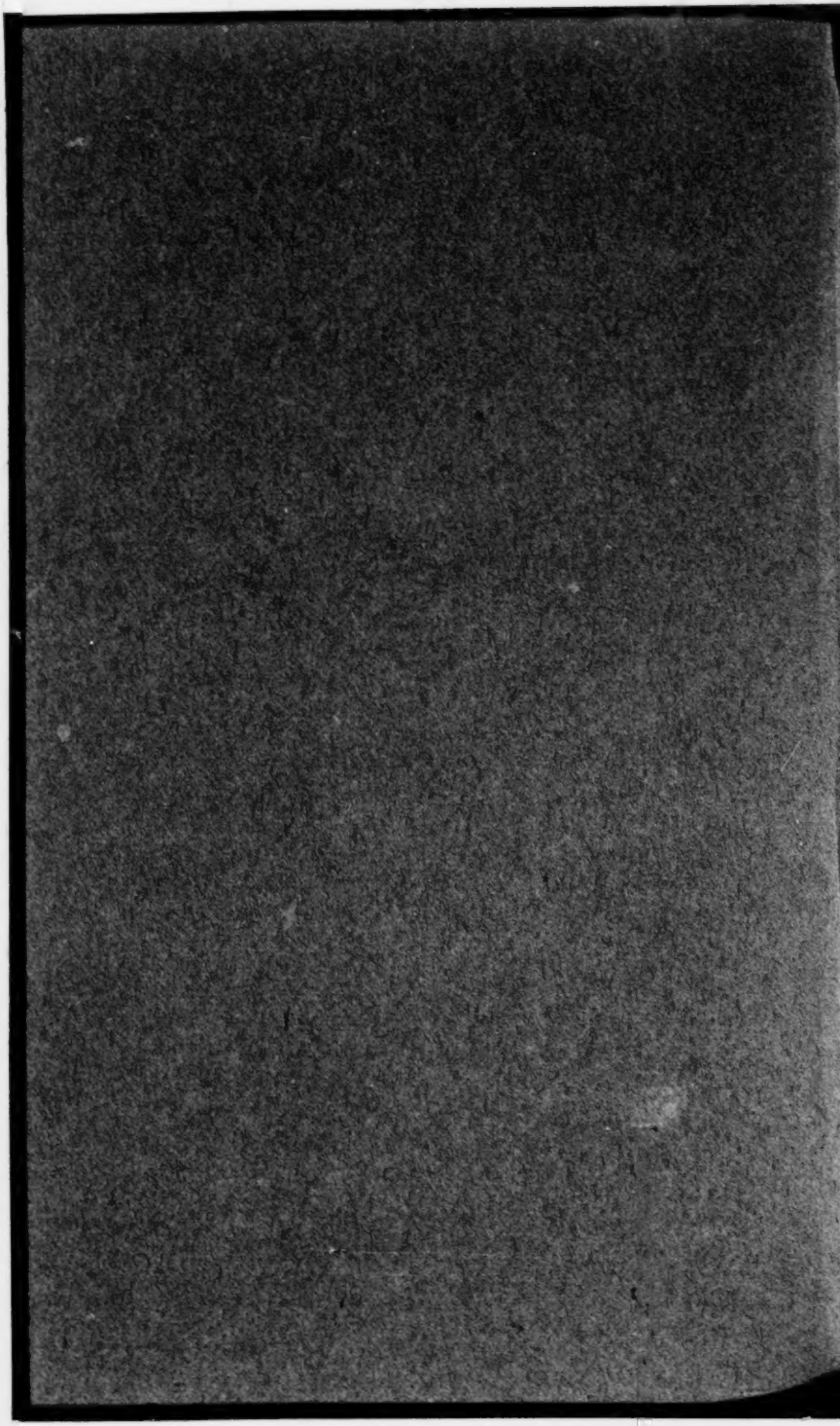
Theodore Sikora,
Petitioner,
vs. No. 247
The State of Michigan,
Respondent.

PETITION FOR WRIT OF CERTIORARI AND SUPPORTING BRIEF

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AMERICAN PRINT AND RECORD CO., GRAND RAPIDS, MICHIGAN



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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1945

THEODORE BENTZ,
Petitioner,

vs.

No. .....

THE STATE OF MICHIGAN,
Respondent.

PETITION FOR WRIT OF CERTIORARI

TO THE HONORABLE THE SUPREME COURT OF THE UNITED STATES:

Your petitioner, Theodore Bentz, considering himself aggrieved by an order of the Supreme Court of the State of Michigan entered April 1, 1946, denying his application for a writ of habeas corpus, files this petition praying for an appeal by certiorari of the matters of fact and law from said state appellate court.

Petitioner respectfully shows unto the Court:

That he is imprisoned and restrained of his liberty by the Warden of the State House of Correction and Branch Prison and that he is so imprisoned and detained of his liberty at the said prison in the Township of Marquette, County of Marquette and State of Michigan.

That the cause or pretense of such imprisonment and restraint of your petitioner, according to the best knowledge and belief of your petitioner, is by virtue of a commitment made by the Hon. Fred T. Miles, Circuit Judge, in and for the County of Ottawa. The original commitment is now in the possession of the said Warden and when

produced will show that your petitioner has been committed to said prison for a period of not less than life and not more than life from and including the 25th day of September, 1934. Copy of said commitment is tendered herewith, made a part hereof, and marked Exhibit "1".

That your petitioner is not committed or detained by virtue of process of any court or judge of the United States, in a case where such court or judge has exclusive jurisdiction; or by virtue of a legal, final judgment or decree of any court of competent civil or criminal jurisdiction, or of any legal executon issued upon such judgment or decree, the time for such restraint being unexpired; or for any treason, felony or other crime committed in any state or territory of the United States for which he, your petitioner, ought, by the Constitution and laws of the United States, to be imprisoned and restrained of his liberty by the executive and administrative power of such state or territory.

SUMMARY AND STATEMENT OF MATTER INVOLVED

In 1934, although he established an alibi which was not discredited, petitioner was found guilty by a jury in the Circuit Court of Ottawa County at Grand Haven, Michigan, of committing robbery armed, upon an information charging him under a different statute. The trial judge forthwith gave him a life sentence. Later petitioner produced new evidence, consisting of two confessions made by two of the real participants absolving him of the crime. Other documentary evidence was also produced. This evidence, positively establishing his innocence, substantially corroborated petitioner's alibi, was tendered with a delayed motion for a new trial. The trial judge, in every instance, arbitrarily denied him the right to have a jury decide the new evidence. The state appellate court, in every instance, tyrannically refused to grant him permission to appeal. Petitioner has been and still is being illegally restrained of his liberty in said prison on a commitment that was made by virtue of proceedings at the trial which were so grossly lacking in elements of fairness and jus-

tice as to result in depriving petitioner of due process of law. The commitment, since it was made, has been shown to be the outcome of a grave miscarriage of justice.

In 1945, after having exhausted every legal remedy by attempted appeals and having been denied in every instance without so much as obtaining a review of the case, petitioner resorted to a collateral attack by habeas corpus. He made and filed an application in the Michigan Supreme Court. He based the application on the facts and law, supported every contention by applicable decisions of this Court.

The Michigan Supreme Court, on April 1, 1946, without issuing the writ and without taking the trouble to write an opinion based upon judicial precedent of this Court, arbitrarily denied petitioner's application for the writ.

The said appellate court, on its order denying the application, asserted petitioner was convicted in a court of competent jurisdiction. Petitioner contends he was not because the trial court, among other things transcended its jurisdiction and therefore rendered its judgment in violation of the Constitution. The state appellate court stated the issues raised by petitioner's application does not constitute ground for granting habeas corpus. This contention should be reversed, because it is not in any way in accord with applicable decisions of this Court, considering the matter as a whole. Further, the state appellate court should be reversed because it has refused in every instance to decide the issues and questions involved in this case, functioning contrary to applicable decisions of this Court.

BASIS OF JURISDICTION

Petitioner is a citizen of the United States by virtue of having been born in East Grand Forks, Minnesota, on the 4th day of July 1903. The jurisdiction of this Court to proceed in this matter is claimed by virtue of that fact and under Section 237 of the Jurisdictional Acts of February 13, 1925 (Chapter 299, 43 Stat. 936), as amended on June 29, 1938 (Sec. 344, U.S.C.).

The trial, conviction and sentence were not in conformity with the Fifth or Sixth or Fourteenth Amendment to the Constitution, nor in accord with Section 16 of Article 2 of the State constitution.

The trial itself was a travesty upon the abiding principles, as practiced in American courts, violated all concepts known to procedural due process.

The right of a state to prescribe its own modes of judicial proceeding is construed in *Bowman v. Lewis,* 101 U.S. 22, 31, but when the essential elements of a court having jurisdiction are not present and the procedure runs afoul of the Fourteenth Amendment, the power of the State over its methods of procedure is substantially restricted by the due process clause of the Constitution. *Jordon v. Massachusetts,* 225 U.S. 167, 176. If the State proceedings are wanting, like in the instant case, in those essentials or of procedural due process, then the United States Supreme Court has jurisdiction to review and reverse the judgment of the state tribunal. *Pennoyer v. Neff,* 95 U.S. 714, 733.

The Constitution does not guarantee that the decisions of state courts shall be free of error. But if the errors are so gross as to be an irrational administration of justice, like in the instant case, it is a denial of due process and the jurisdiction of this Court may be called upon, either by appeal or certiorari, after a convicted person has exhausted his state legal remedies as required by law.

The state appellate court, by virtue of Section 13555, 3 Compiled Laws of Michigan for 1929, is vested with original and appellate jurisdiction to inquire into a conviction by habeas corpus. Weight of authority holds it was required to issue the writ and inquire into the cause. *Roberts v. Reilly,* 116 U.S. 80; *Sharpe v. Commonwealth of Kentucky,* No. 8909 (C.C.A. 6th) 135 F. 2d 974; And see, *Smith v. O'Grady,* 312 U.S. 329, 85 L. Ed. 859, and collated opinions.

The Circuit Court of Appeals for the Ninth Circuit has made the following pronouncement on this point (Graham v. Squire, 132 F. (2d) 681, 683 (C.C.A. 9th — 1942):

> "• • • the Supreme Court intended no more than that the writ of habeas corpus should issue only in those cases where the denial of the constitutional rights of the accused operated to prevent the trial court from acquiring jurisdiction over the person of the accused, or if jurisdiction did exist at the commencement of the trial, operated to destroy that jurisdiction at some stage during the progress thereof."

The state appellate court ignored this Court's ruling in the *Smith v. O'Grady* case (312 U.S. 329) in connection with the instant case. In that case prisoner made application to the Nebraska Supreme Court for writ of habeas corpus, after eight years imprisonment, on the claim that his incarceration was in violation of the Federal Constitution. In denying the writ the Nebraska court, exactly as did the Michigan Supreme Court in the instant case, held that petitioner's allegations — even if proven in their entirety — would not entitle him to habeas corpus, even if the petition showed a deprivation of federally protected rights. This Court, in reversing the Nebraska court's decision, said:

> "The state court erroneously decided that the petition stated no cause of action. If the petitioner can prove his allegations the judgment upon which his imprisonment rests was rendered in violation of due process and cannot stand."

The Michigan Supreme Court, in connection with the instant case, also ignored the doctrine stated by this Court in the case of *Mooney v. Holohan,* 294 U.S. 103, 113, wherein the court said:

> "Upon the state courts, equally with the courts of the Union, rests the obligation to guard and enforce every right secured by that Constitution."

Moreover, the Michigan Supreme Court ignored the case of *Johnson v. Zerbst,* 304 U.S. 458, 466, among others, wherein this Court held that a person in custody "may have a judicial inquiry * * * into the truth and substance of the causes of his detention * * * (and that) such a judicial inquiry involves the reception of testimony, as the language of the statute shows" (312 U.S. 285, 286).

It is submitted, therefore, to invoke the jurisdiction of this Court in this case is proper and wholly tenable, as provided by law.

QUESTIONS PRESENTED

The said imprisonment and restraint is illegal and contrary to law, and such illegality consists in this, among other things, the following:

1.

(Point One)

That generally the proceedings at the trial and subsequently had were so grossly lacking in elements of fairness and justice as to result in depriving petitioner of due process of law.

(1) The trial court violated the 14th Amendment and disregarded the intention cited in the Michigan statutes, to-wit, in 3 *C. L.* 1929, Sections 17354 and 17355, by denying petitioner the right to have a jury review new evidence obtained by him after diligent and an exhaustive probing to establish the truth and facts of the case, including certified confessions of the genuine participants exonerating this petitioner from any participation or knowledge of the offense involved.

(2) The trial court denied petitioner full recourse to the law and to the inherent precedents of due process guaranteed by Article 2 in Section 16 of the Michigan Constitution.

(3) The trial court denied petitioner equal protection of the law by allowing him to be convicted on testimony which was shown to be deliberately fabricated, prearranged and outlined by the prosecution.

(4) The trial court denied petitioner the rights secured by the Sixth Amendment to the United States Constitution, and also secured by the state Constitution in Section 19 of Article 2, by denying him the right of confrontation of witnesses against him and the right to "cross examine and question them."

(5) The trial court denied petitioner due process by deliberately withholding and excluding evidence pertinent to his defense but damaging to the prosecution.

(6) The trial court denied petitioner the right to a fair and impartial trial by allowing the prosecution to elicit damaging and prejudicial testimony by overstepping the latitude permitted in cross examination of a witness.

(7) The trial court denied petitioner due process by admitting in evidence prejudicial statements by an interested police official and a biased, disgruntled bank employee.

(8) The trial court denied petitioner a fair and impartial trial by admitting matters in evidence not concerning the facts of the cause.

(9) The trial court denied petitioner "notice and opportunity to defend."

(10) The trial court denied petitioner due process by permitting the prosecution to infer before the jury that petitioner was known as a suspected criminal because his picture was in a police rogue gallery, while petitioner was never before convicted for a felony.

(11) The trial court denied petitioner fairness when it disregarded the rules of evidence in connection with its instructions to the jury — by making discriminatory remarks regarding petitioner's alibi witnesses who were all first-rate citizens.

(12) The state through its appellate court has denied petitioner rights provided by the Constitution and the Court's interpretation thereof.

2.

(Point Two)

The Michigan Supreme Court has decided federal questions in this cause in a way not in accord with applicable decisions of this court.

REASONS RELIED ON FOR ALLOWANCE OF THE WRIT

(1) That generally the proceedings at the trial and subsequently had were so grossly lacking in elements of fairness and justice as to result in depriving petitioner of due process of law.

(2) That the Michigan Supreme Court has decided federal questions in this cause in a way not in accord with applicable decisions of this Court and has departed from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision.

WHEREFORE, petitioner prays that this Honorable Court will issue its writ of certiorari in this case, to be directed accordingly and returnable forthwith in order that your honors may inquire into the cause or pretense of said imprisonment and restraint, as provided by law, and that petitioner may be relieved therefrom. And he will ever pray.

Theodore Bentz,
Petitioner, Pro Se.

AFFIDAVIT

STATE OF MICHIGAN
SS.
COUNTY OF MARQUETTE

Theodore Bentz, being duly sworn on his oath, deposes and says that he is the petitioner and movant in the foregoing pages of this petition for a writ of certiorari, that the statement and averments above made are true, to the best of his knowledge and belief.

Theodore Bentz,
Petitioner.

Subscribed and Sworn to before me, a Notary Public, this 6 day of June, A.D. 1946.

B. J. Harrington,
Notary Public, Marquette Co., Mich.
My commission expires Aug. 11, 1948.

(Seal)

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1945

THEODORE BENTZ,
Petitioner,

vs.

No. .....

THE STATE OF MICHIGAN,
Respondent.

BRIEF SUPPORTING PETITION FOR WRIT OF CERTIORARI

SUMMARY OF FACTS

Petitioner was convicted in the Circuit Court of Ottawa County, Michigan, in September, 1934, of committing robbery armed, on an information charging him under a distinctly different statute. He was immediately sentenced to life imprisonment in the state prison. Recently he filed an application for habeas corpus in the Michigan Supreme Court. This was denied on April 1, 1946. He therefore seeks certiorari in this Court, as provided by law. However, to get a clear understanding of the whole matter, reading of a chronological statement of facts is required, as will follow:

STATEMENT OF FACTS

Testimony shows that about 3 o'clock in the afternoon of August 18, 1933, the Peoples Savings Bank of Grand Haven, Michigan, was robbed. Four bandits entered the front door of the bank, as the fifth remained at the back door, while the sixth stayed at the wheel of the "get-away" car. An employee of the bank set off an alarm and the

driver fled with the car. Five of the bandits trapped in the bank herded the customers and employees out at gun point. Four of the bandits in their escape dropped the sack of loot and commandeered an automobile a block from the bank, divesting two women thereof, and fled. They made good their escape. In attempting to escape the remaining bandit, Earl Doyle, was captured, arraigned, pleaded guilty before the Circuit Court of Ottawa County, and was given a life sentence. He is now confined in the House of Correction at Detroit.

During July, 1934 — almost a year from the date of said robbery — Theodore Bentz, alias Theodore Craig Bentz, herein referred to as petitioner, was arrested by federal agents at his business, a pharmaceutical manufacturing plant, in Portland, Maine, in connection with the holdup of June 4, 1934, of the Caledonia National Bank of Danville, Vermont, of which he was subsequently exonerated and released. Upon leaving the federal court in Portland he was arrested by local police and held for the sheriff of Ottawa County, Michigan, who sought to extradite him on affidavits signed by two bank employees to stand trial on an information purporting to charge him with said robbery.

Petitioner protested his innocence and fought extradition, claiming he was not a fugitive from justice, since he never had set foot on the soil of the State of Michigan. Not having any witnesses in Portland, except two F.B.I. agents who failed to appear in court, to prove he was in Chicago, Illinois, when the robbery occurred in Grand Haven, Michigan, petitioner was forced to rely on the testimony of his wife and himself. The result was that the chief executive of Maine, on recommendation of the state's attorney general, ordered petitioner's extradition to Michigan. On August 20, 1934, after a preliminary examination, petitioner was bound over to the Circuit Court of Ottawa County at Grand Haven, Michigan, for arraignment and plea.

On September 20, 1934, petitioner was arraigned on said information. He pleaded not guilty thereto and entered notice of alibi to show he was, at the time the

robbery occurred, in Chicago, Illinois, more than 200 miles away, and would produce witnesses to establish such fact.

In order to avoid confusion petitioner whose name at the time was Theodore Craig Bentz, was tried under the name of Theodore Bentz. Yet the name "Craig" was arbitrarily and constantly mentioned during the trial.

Shortly before the trial petitioner's attorney asked to retire from the case. Without adequate preparation Attorney Elbern Parsons of Holland, Michigan, took over, four days before the trial. He allowed the case to be tried before a jury of 12 whose minds already had been swayed by flaming and untrue newspaper accounts of the petitioner.

The trial convened on September 24, 1934, lasted two days. The trial itself was so grossly lacking in elements of fairness and justice that it deprived petitioner of due process of law. The jury, swayed by the judge's personal opinion and by the unprecedented and devious methods of the prosecution, found petitioner guilty as charged. Upon motion of the prosecutor, the trial judge adjusted himself to impose sentence. He asked petitioner if he had anything to say. Petitioner, deprived of taking the stand by the advice of his counsel, vigorously protested his innocence in the following words;

> "THE COURT: You may stand up here with the Sheriff. Anything you want to say on the record, Mr. Craig, why the sentence of the court should not be pronounced in your case?
>
> MR. BENTZ: What I have got to say is that I am innocent of this offense, and it will be on your conscience, boys, all your lives. I never robbed this bank, and it will be proven sooner or later. That is all I have to say (T. 163)".

The trial judge disregarded this statement and made some immaterial remarks. Petitioner again declared: "MR. BENTZ: Judge, I never robbed this bank" (T. 164). The judge thereupon imposed a life sentence for robbery armed, a distinctly different crime than that charged in the information.

Although 30 persons claimed to have seen the robbery the State produced only eight witnesses, six of them were bank employees. Four employees of the bank, who had been coaxed and directed by the prosecutor and induced by a certain detective and a certain police officer to name the petitioner as being one of the robbers, identified petitioner tentatively before the trial and positively on the trial. Each of these witnesses had been shown a picture of petitioner before the trial, at which time they were induced to identify it as being one of the bandits. Each of these witnesses fabricated their testimony which was so inconsistent and contradictory that a fair and impartial trial was impossible, unless they had have been rebuked by the trial judge who did nothing about it. Defense counsel who was wholly inadequately unprepared to try the case and who had not made an investigation of any kind to ferret out essential facts appeared at a loss to protect petitioner's fundamental rights in the proceedings.

The cashier of the bank, Mr. Bolt (T. 71-78) and the auditor, Mr. Lindemulder (T. 84-86), both of whom saw the bandits and were, according to their testimony, alongside other witnesses in the bank, testified petitioner was *not* one of the men they saw during the robbery.

The State produced a Mr. Evans who alleged petitioner cashed a travelers' check in payment for a hat in Hammond, Ind (T. 81-83). No witnesses were produced who could properly show such check was in the bank at the time of the robbery. Evans' testimony was inadmissible. The trial court had no jurisdiction to hear such matter; for it was a separate matter, if a crime, which occurred in another state. Allowance of Evans' testimony was a traverse upon petitioner's just rights to a fair trial.

The last witness to give direct testimony for the State was the chief of police of Grand Haven, a Mr. DeWitt (T. 88-90), whose testimony was highly prejudicial because it deprived petitioner of the right to remain silent on the presumption of innocence.

As alibi witnesses petitioner produced three business men from Chicago. They testified that they positively

saw petitioner in Chicago between the hours of noon and 3:30 P. M. and again later in evening, and that therefore his participation in the robbery on Friday, August 18, 1933, would have been an impossibility. These witnesses were not discredited (Bailey, T. 96-100; Shugan, T. 109-112; Knuth, T. 122-124). Petitioner's wife, Christina, also testified in his behalf. She testified that she was with him all day during the day in question, and that he was in Chicago and not in Michigan at all (T. 138-142). The state did not produce any testimony to disprove the testimony of these witnesses, nor could the state do so. For when you deal with truth you deal with something that cannot be shaken.

Petitioner also produced Earl Doyle, one of the participants who was captured at the scene of the robbery. He was brought from prison to testify. Doyle testified that he participated in the crime, knew each and every one of the participants, and that petitioner was not one of them nor was the petitioner involved. And, moreover, the petitioner was a stranger to him (T. 133-134).

John DeKoster then testified, said that one day after the robbery, while he was in the bank of business, two of the bank employees remarked that he resembled the taller of the first two bandits to enter the bank (T. 136). It is significant to note, petitioner is accused of being the taller of the first two bandits to enter the bank. In his instructions to the jury the trial judge remarked that he did not think such testimony had any bearing on the case (T. 153). But obviously this influenced the jurors and consequently played some part in divesting petitioner of a fair trial.

The proceedings at the trial, generally, were so grossly without the elements of fairness and justice that the result of them deprived petitioner of due process of law. Due process was flippantly disregarded at almost every stage of the trial. There was bias; hate and opinionated conceit predominating the court room in this case, not the sane, equitable conduct and fairness known to American jurisprudence. Since the facts constituting a substantial deprivation of due process shall be set out with each point,

we need not look at them at the moment. However, the record alone shows patently what proceedings lacked.

After the trial judge had given his instructions to the jury, and they retired to deliberate their verdict, the jurors asked for some information as to a certain date on a travelers' check. The trial judge, against all precedents, reopened the case for the prosecution and deprived the defense of any opportunity to reply. With that, some hours later, the jury brought in a verdict of guilty. That was on September 25, 1934, and the judge forthwith sentenced petitioner to do a life sentence in prison.

In January, 1936, petitioner filed a delayed motion for a new trial and supplemented it by another similar motion filed during May of that year. These motions, taken as one, were denied by the trial judge on December 31, 1938. A few days later the trial judge, still holding to his denial, supplemented his opinion. No appeal was taken therefrom, although it was begun.

In August, 1942, a similar motion was made and filed in the same court, supported by new evidence showing petitioner was absolutely innocent of the robbery. This motion was arbitrarily denied for similar reasons, notwithstanding the fact that the leader of the participants in the robbery had in the meantime been apprehended — and, by a notarized confession, fully corroborated by Doyle and by the Michigan State Police, totally exonerated petitioner from any blame, participation or knowledge in the robbery in question.

From this denial petitioner made a timely appeal to the Michigan Supreme Court upon an application for leave to appeal as procedural methods require in Michigan. The said appellate court, without giving any reason whatever, denied petitioner leave to appeal. The order of denial is dated April 6, 1943. Petitioner motioned the same court for a rehearing. This, too, was denied, on May 19, 1943.

Thereupon petitioner asked this Court for leave to appeal and was denied for failing to file the appeal within the statutory time allowed for appeals. See *Bentz v. State of Michigan*, 64 S. Ct. 33, 85.

Thereupon petitioner made and filed an application for a writ of habeas corpus in the Michigan Supreme Court. The application was denied on April 1, 1946, in a way not in accord with the applicable decisions of this Court.

ARGUMENT AND THE QUESTIONS PRESENTED, CONSTITUTING VIOLATION OF PETITIONER'S CONSTITUTIONAL RIGHTS

The following will clearly show why and how petitioner's constitutional rights were wantonly and arbitrarily disregarded denying him due process of law and full recourse to the law of the land, during the trial and during subsequent correctional process, which the State of Michigan consistently refused to allow.

1.

(Point One)

Generally the Proceedings at the trial and subsequently had were so grossly lacking in elements of fairness and justice as to result and did result in depriving petitioner of due process of law.

At one time on habeas corpus the court was confined to the record of the trial court.[1] The record was not subject to impeachment or contradiction, but imported absolute verity. Extrinsic evidence was inadmissible. The procedure was, however, liberalized and these barriers abrogated by the Act of February 5, 1867.[2] This statute radically modified habeas corpus procedure by permitting the court to determine the facts and to hear testimony for that purpose. The Act of 1867 constitutes a landmark in the development of habeas corpus procedure and its salient provisions may well be recognized.[3] By virtue of this statute the prisoner may have a searching judicial inquiry into the truth and substance of the causes of his

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[1] Ex parte Watkins, 3 Pet. 193, 202; Frank v. Mangum, 237 U. S. 309, 330-331 (1915).

[2] 14 Stat. 385.

detention, even though it may become necessary to look behind and beyond the record for that purpose. Facts deemed jurisdictional may be scrutinized irrespective of whether or not they appear in the record. Evidence of extrinsic facts is admissible.

At one time it was held that this provision authorized inquiry into the facts outside of the record only if the facts supplemented the record but did not contradict it. Evidence of facts inconsistent with the record was still deemed inadmissible.[4] This limitation, which seems somewhat artificial, appears to have been discarded and no longer fetters the courts in their search for the truth. The petitioner on habeas corpus "may have a judicial inquiry * * * into the very truth and substance of the causes of his detention, although it may become necessary to look behind and beyond the record of his conviction."[5] In that case the testimony was held admissible to overcome the presumption of regularity which the record of the trial imported.

The next step in the direction of broadening the scope of review on habeas corpus was taken in *Mooney v. Holohan*, decided by this Court in 1935.[6] The case involved a motion in the Supreme Court for leave to file a petition for habeas corpus. The applicant was a prisoner serving a sentence in a State penal institution for murder of which he had been convicted in a State court. It was charged by the petitioner that the State held him in confinement without due process of law in violation of the Fourteenth Amendment. The court denied the application without prejudice, on the ground that defendant had not exhausted his recourse to judicial remedies afforded by the State.

The *cause celebre* of *Johnson v. Zerbst* was decided by the Supreme Court in 1938.[7] It is a leading case in the

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[3] U. S. Code, title 28, secs. 454, 456, 460 and 461.

[4] Riddle v. Dyche, 262 U. S. 333.

[5] Frank v. Mangum, supra, 331. This expression was quoted with approval in Johnston v. Zerbst, 304 U. S. 458, 467.

[6] 294 U. S. 103.

[7] 304 U. S. 458.

field of constitutional law, in connection with the interpretation of the provisions of the Sixth Amendment. The Court indicated that if it were found from the evidence that the petitioner had sustained the burden of proof resting upon him on that issue raised, it would follow that the trial court did not have jurisdiction to proceed to judgment and conviction of the petitioner. The reasoning of the court is revealed in the following statements contained in its opinion:[8]

> "True, *habeas corpus* cannot be used as a means of reviewing errors of law and irregularities — not involving the question of jurisdiction — occurring during the course of trial; and the 'writ of *habeas corpus* cannot be used as a writ of error.' These principles, however, must be construed and applied so as to preserve — not destroy — constitutional safeguards of human life and liberty. The scope of inquiry in *habeas corpus* proceedings has been broadened — not narrowed — since the adoption of the Sixth Amendment."

It will be observed that the orthodox concept of jurisdiction was greatly expanded and enlarged. First, it was enunciated that although the court may have jurisdiction at the beginning of the trial, the jurisdiction may be lost in the course of the prosecution, rendering the court without power to proceed to judgment. Second, fulfillment of the guarantee of the rights deemed fundamental was deemed a jurisdictional requirement. The basis for this conclusion was that if a guarantee is not provided for an accused who has not intelligently waived it, there is a failure to complete the court. The conclusion is then logically deduced that an incomplete court is without power to act, just as presumably would be the case of a court without a jury in cases in which the trial must be with a jury.

In *Walker v. Johnson*, decided in 1941,[9] the Court reinforced and expanded the conclusions reached in *Johnson*

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[8] Pp. 456, 468.

[9] 312 U. S. 275.

v. Zerbst. A week later the Court decided the case of *Smith v. O'Grady,*[10] in which resort was had to a petition for a writ of habeas corpus by an inmate of a State prison serving a sentence imposed upon him by a State court. He claimed that by means of deception practiced by the prosecuting attorney he had been inveigled into pleading guilty to a charge of burglarly with explosives for which he was sentenced to imprisonment for a term of twenty years. He contended that he had pleaded guilty by prearrangement with the prosecuting attorney on the basis of an agreement that the sentence would be for not over three years. This Court held that in the light of the surrounding circumstances, if these things happened, the petitioner was imprisoned under a judgment invalid because obtained in violation of procedural guarantees protected against State invasion by the Fourteenth Amendment. It concluded that the petition set forth sufficient grounds for granting a writ of habeas corpus.

The case of *Waley v. Johnston,* decided in 1942,[11] is the next milestone to be noted. The conclusion was reached that the application for *habeas corpus* was sufficient. The chief principle involved was formulated by the court as follows:[12]

"The issue here was appropriately raised (denial of due process) by the *habeas corpus* petition. The facts relied on are dehors the record and their effect on the judgment was not open to consideration and review on appeal. In such circumstances the use of the writ in the federal courts to test the constitutional validity of a conviction for crime is not restricted to those cases where the judgment of conviction is void for want of jurisdiction of the trial court to render it. It extends also to those exceptional cases where the conviction has been in disregard of the constitutional rights of the accused, and where the writ is the only effective means of preserving his rights. *Moore v. Dempsey,* 261 U. S. 86; *Mooney v. Holohan,* 294 U. S. 103; *Bowen v. Johnston,* 306 U. S. 19, 24."

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[10] 312 U. S. 329.

[11] 316 U. S. 101.

[12] P. 104.

The latest utterance of this Court on this subject is found in the opinion in *Pyle v. Kansas,* rendered in December 1942.[13] The case involved an application to a State court for a writ of habeas corpus to review a judgment of conviction pursuant to which the petitioner was incarcerated in a State prison. The matter reached the Supreme Court on certiorari to the highest court of the State. The petitioner's contention was that he had been convicted as the result of perjured testimony, known by the prosecuting authorities to have been false, and by the suppression of testimony favorable to him. It was further asserted that several of the witnesses had been coerced into testifying falsely against him. The court held:[14]

> "These allegations sufficiently charge a deprivation of rights guaranteed by the Federal Constitution, and, if proven, would entitle petitioner to release from his present custody. *Mooney v. Holohan,* 294 U. S. 103."

A striking feature of several of the cases that have just been discussed is that they involved no infirmity in the judicial proceeding proper. Nothing done or left undone by the court and nothing in the constitution of the court led to invalidating the judgment. The collateral attack on the conviction was based on and sustained solely because of the sins of the prosecuting and law enforcement authorities, committed outside of court. It would seem to follow that jurisdiction of a court may be lost after it has once attached not only by defective constitution of the tribunal or by actions or failure to act on the part of the court, but also by illegal activities of prosecuting and law enforcement officers outside of the court and of which the court may not even be aware.

The doctrine that the rule of *res judicata* does not apply in habeas corpus proceedings is retained.[15] A petitioner is permitted to advance and litigate any new point on the

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[13] 317 U. S. 213.

[14] P. 216.

[15] Waley v. Johnston, 316 U. S. 101, 105.

second application.[16] After issues of fact are raised, testimony may be presented either orally or by deposition.[17] On the return to the writ the defendant must be produced in person before the judge, who is required to hear the prisoner and other witnesses himself and may not refer the case to a commissioner or a master, is the rule.[18] In reviewing an order in a habeas corpus proceeding, an appellate tribunal is not bound by the findings of fact of the lower court. All questions of law or fact arising upon the record are open to consideration *de novo*.[19]

At this point it may be tenably said that if the error or errors led to a failure of the trial court to obtain jurisdiction or to a divesting of jurisdiction by reason of subsequent events, *habeas corpus* on collateral attack is proper.

The Circuit Court of Appeals for the Ninth Circuit has made the following pronouncement on this point:[20]

> "* * * the Supreme Court intended no more than that the writ of *habeas corpus* should issue only in those cases where the denial of the constitutional rights of the accused operated to prevent the trial court from acquiring jurisdiction over the person of the accused, or if jurisdiction did exist at the commencement of the trial, operated to destroy that jurisdiction at some stage during the progress thereof."

ARGUMENT ON QUESTIONS SUPPORTING THE ALLEGATION

(1) Confessions from two of the bank bandits who freely and openly admit their guilt, corroborated by other new evidence, showing petitioner had nothing to do with robbing of the bank, is conclusive that justice has not been

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16 Adams v. United States, ex rel McCann, 320 U. S. 220.

17 Walker v. Johnston, 312 U. S. 275, 285.

18 Holiday v. Johnston, 313 U. S. 342 (1941).

19 Carruthers v. Reed, 102 F. (2d) 933 (C. C. A. 8th—1939) cert. den., 307 U. S. 643.

20 Graham v. Squire, 132 F. (2d) 681, 683 (C. C. A. 9th—1942).

done.[21] The State violated the 14th Amendment by denying petitioner the right to have a jury review this evidence, acquired through years of diligent search and exhaustive probing, the following:

(A) F. B. I. Agents Thompson and Keefe, after a thorough investigation, positively stated petitioner was in Chicago all day during the day of the robbery. This fact the trial court ignored (See Exhibit "I").

(B) In 1936 Edward W. Bentz, a fugitive from justice, was arrested in New York. He, on April 22, 1940, signed, freely and of his own will, a complete, detailed confession and minute description of the identities and movements of all the participants in the robbery, completely absolved this petitioner from having taken any part or having any knowledge of the crime. (See Exhibit "A"). In the opinion denying motion the trial judge said, "It is hardly possible that any jury would be influenced by the testimony or deposition of a witness of this character."

This Court held that a confession if freely and voluntarily made, is evidence of the most satisfactory character, cannot be ignored.[22] Edward Bentz' confession was corroborated by Earl Doyle's attestation (See Exhibit "C"). It was also corroborated by an investigation made by Lt. P. L. Hutson, of the Michigan State Police, who absolved petitioner of the robbery after investigation was made. It was further supported by testimony of Mrs. Verna Bentz (Exhibit "D"), Rose Kelso (Exhibit "E"), and Roy Kelso (Exhibit "F"), set out in affidavits, to-

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[21] Sec. 17354 & Sec. 17355, Comp. Laws Mich. 1929.

[22] Hopt v. Utah, 110 U. S. 574, 583, wherein this Court said:
"A confession if freely and voluntarily made, is evidence of the most satisfactory character. Such a confession, said Eyre, C.B., 1 Leach 263, 'is deserving of the highest credit, because it is presumed to flow from the strongest sense of guilt, and therefore it is admitted as proof of the crime to which it refers.'
"Elementary writers of authority concur in saying that, 'while from the very nature of such evidence it must be subjected to careful scrutiny and received with great caution, a deliberate, voluntary confession of guilt is among the most effectual proofs in the law, and constitutes the strongest evidence against the party making it that can be given of the facts stated in such confession'—citing 1 Greenleaf, Ev. Section 215; 1 Archbold, Cr. Pl. 125; 1 Phillips' Ev. 533, 534; Starkie, Ev. 73.
"Any corroborating circumstances will serve which in the judge's opinion go to fortify the truth of the confession."

gether with Ed's additional attestation labeled "Testimony In Error," included in record of "*New Evidence Acquired Since the Trial.*"

These pertinent facts were disregarded by trial judge in a way not in accord with the applicable decisions of this Court. His action was arbitrary,[23] despotic.[24]

Where the concept of due process is concerned an adverse decision cannot rest upon the opinion of one judge. For it is not the intent of the framers of the Constitution to sustain imprisonment of an innocent person.

The trial judge's statement disparaging the alibi was not justified, is a transcendency of jurisdictional judgment. The alibi witnesses were of impeccable character. Their testimony was corroborated by petitioner's wife. The State failed to discredit the alibi. The alibi met every requirement of the law,[25] was ignored. Moreover, the trial judge transcended the concepts of due process by ignoring Exhibit "H", consisting of corroborative evidence indicating petitioner's innocence, which was presented with the motion.

Further, the trial judge disregarded Exhibit "I", consisting of evidence showing the F. B. I. were satisfied petitioner had no part in the Grand Haven robbery here in question. The above facts show that the elements of due process are so grossly lacking in the trial judge's administration of justice in procedure following the trial as to constitute transcendency of jurisdiction, a deliberate denial of the fundamental right to have the evidence heard

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23 Smith v. O'Grady, 312 U. S. 334.

24 McNabb v. United States, 63 S. Ct. 608.

25 Fielder v. United States, 227 F. 832.

by a jury of one's peers, as guaranteed by Article 5 of the Constitution.[26]

(2) During and after the trial petitioner discovered that the prosecutor withheld from defense counsel and petitioner material evidence favorable to defendant on trial. Failure of prosecuting attorney to indorse on the information the names of witnesses and produce them at the trial is not a mere irregularity. It is a positive evasion of a substantial right.[27]

Petitioner properly claimed such failure constituted after-discovered evidence.[28] For it denied a fundamental right.[29]

What is this evidence? While four of the bandits were fleeing from the robbery they stopped Mrs. Louis Bonema and Mrs. Joe Miller who were riding in an automobile. They snatched the car away from them to further their escape. At the same time, Mr. & Mrs. G. G. Murray, rid-

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[26] Chambers et al v. State of Florida, No. 195, 60 S. Ct. 472, wherein the Court made the following observation:

"The 'due process' clause of Article 5 of the United States Constitution and fundamental rights of the Fourteenth Amendment, was intended to guarantee procedural standards adequate and appropriate to protect at all times people charged or suspected of crime by those holding positions of power and authority.

"Under our Constitutional system, the court is a guard against any winds which may blow; a haven of refuge for those who might otherwise suffer; because they are helpless, weak, outnumbered, or because they are non-conforming in time of prejudice and public excitement. Due process of law is preserved for all by our Constitution and commands that no person shall be deprived of his liberty unless he shall first have had the entire resource of the court trial. The higher duty of a court is solemn responsibility in seeing justice done, not being the tool of influential persons, or groups but a living shield translated into maintaining this constitutional proviso, inscribed for the benefits of every human being whatever his creed or race."

But see, too, McNabb v. U. S., 63 S. Ct. 608, wherein this Court pointed out: "Experience has therefor counseled that safeguards must be provided against the danger of over-zealous as well as the despotic. The awful instrument of criminal law cannot be entrusted to a single functionary. The complicated process of criminal justice therefore divided into different parts, responsibility for which is separately vested in the various participants upon whom the criminal law relies for its vindication. It outlaws easy but self-defeating ways in which brutality is substituted for brains or an instrument of crime detection."

[27] Section 15761, Comp. Laws Mich. 1915; Sec. 17254 C. L. Mich. 1929; construed in People v. Blazenzitz, 212 Mich. 675.

[28] Clark, Handbook on Crim. Proc. page 587; 3 Wharton, Crim. Proc., 10th Ed., Sec. 1799.

ing in an automobile, approaching from the opposite direction, saw the episode and the bandits. None of these persons was either indorsed on the information or called to the trial. Some distance from Grand Haven, where the bank is located, the four bandits commandeer a car from Mrs. Oscar Varneau. Her husband, who was at the door of a farm house, saw the men, came running to aid his wife. In the face of guns they could do nothing, except make a good mental picture of the bandits who fled with their Chrysler. Of the above witnesses the prosecutor knew, failed to call them because he knew they would testify that petitioner was not one of the bandits.

Just north of Adrian, Michigan, during the same evening of the robbery, these same four bandits commandeer a Ford driven by Gordon Heximer. There were three other occupants in that car. All four of these persons saw the bandits face to face. Yet these witnesses, known to the police on the case, were neither indorsed on the information nor called to the trial by the State.

Ten res gestae witnesses, all of them known to the police and prosecution, were concealed from petitioner because these witnesses could only be instrumental in proving petitioner's innocence. Moreover, a Mr. Van Lopik, a Mrs. Sargent, and a Miss Correll who were present when the robbery occurred and who saw every bandit in the bank were neither indorsed on the information nor called to the trial by the State who concealed them from the defense.

The collateral attack on the conviction can be based on and sustained because of the sins of the prosecuting and law enforcement authorities, committed outside of court. It follows that jurisdiction of the court may be lost after it has once attached by actions or failure to act on the part of the court, as well as by illegal activities of prosecuting and law enforcement officers outside of the court and of which the court may not even be aware.

(3) Where the evidence of facts is as consistent with innocence as with guilt, it is insufficient to sustain a con-

viction.[30] A verdict cannot rest on a mere preponderance of conflicting evidence,[31] as the testimony of the four employees (Pellegrom, Meschke, Welling, and Bugelski) who were induced by Lt. P. L. Hutson to identify petitioner as being one of the bandits. Petitioner was not required to fully establish an alibi to have, at least, the benefit thereof.[32] Testimony relative to an alibi creates a reasonable doubt as to defendant's guilt.[33] The trial judge, in the protection of defendant's constitutional rights, was required to instruct jury that, in view of his alibi, he should be given benefit of any doubt and to find him not guilty.[34] Petitioner was divested of the benefit of the principle of reasonable doubt.[35] Where the scales of justice may be delicately poised between guilt and innocence, and in that event errors which under some circumstances would not be ground for reversal cannot be brushed aside as immaterial.[36] The burden of proof was not on the petitioner to establish his alibi by the preponderance of the evidence. Because it raised reasonable doubt, his acquittal was imperative.[37] Even if petitioner had failed to establish his defense of alibi — although he did not fail since reasonable doubt prevailed — it was imperative for the jury to return a verdict of not guilty.[38] Thus, as established law holds, the jury must also hold — otherwise equal protection of the law has not been provided the accused .

(4) Failure of the State to provide confrontation of witnesses P. G. McCoy, T. E. Matheson, and C. C. Troyano, out of state witnesses against petitioner, violated both

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29 Sec. 16, Article 2, Constitution of Michigan; United States v. Ashe, 2 F. (2d) 735.

30 U. P. v. U. S., 173 F. 737; Williams v. U. S., 286 F. 852.

31 People v. Slight, 48 Mich. 54.

32 People v. Marvill, 236 Mich. 595.

33 People v. Marvill, supra.

34 People v. Resh, 107 Mich. 251.

35 U. S. v. McHugh (D. C. Wash.) 253 F. 224.

36 Glasser v. United States, 62 S. Ct. 457.

37 Falgout v. United States, 279 F. 513.

38 McCool v. United States, 263 F. 55.

state and federal constitutions.[39] The witnesses, supra, indorsed on the information, must be called. Otherwise the evidence to which they could give testimony must be excluded. The evidence was not excluded as required but was arbitrarily superinduced into the trial to deprive petitioner of due process. State claims a stipulation was made to satisfy this. The stipulation by counsel to waive these witnesses was invalid because the prosecutor violated its terms. Some courts hold that the privilege of confrontation may not even be waived.[40] Denial of the privilege falls short of due process of law.[41]

(5) (A) Counsel could not, consistently with due process, make a stipulation in this case, regardless of whether petitioner ratified it, since the evidence on which it was based deprived petitioner of a fair trial.[42] Chiefly because it divested petitioner of the right of confrontation.[43]

(B) Witness DeWitt, chief of police of Grand Haven, consistently with due process and equal protection of the laws, could not withhold material evidence tending to support petitioner's innocence. This witness made a trip to Chicago to investigate petitioner's alibi, uncovered the fact petitioner had called on two stores located in the building where petitioner resided on the day of the robbery. Petitioner, since a year had passed, had forgotten of these calls. When Witness DeWitt returned to Grand Haven from Chicago and called upon petitioner at the jail, the petitioner questioned him. Asked if he had uncovered any new evidence of innocence, DeWitt—eluding petitioner's eye—lied and said he did not and refused to discuss the matter any further. After the trial, however, petitioner had his friends investigate and discovered these witnesses could corroborate the alibi to make it conclusive (See Exhibit Pages 86-90. New Evidence). DeWitt had deliberately

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39 Art. 2, Sec. 19, Const. Mich.; Art. 6, Const. of U.S.

40 Snyder v. Commonwealth of Mass., 291 U. S. 97.

41 Dowdell v. United States, 221 U. S. 225.

42 Snyder v. Commonwealth of Mass., 291 U. S. 97, citing Boel v. Comm., 135 Va. 600, 619, 30 A. L. R. 1345.

43 Art. 2, Sec. 19, Const. of Mich; Art. 6, Const. of U. S.

suppressed this evidence and acted contrary to his sworn duty, divesting petitioner of evidence in his favor.[44] Since the State alone cannot act the act of an officer as an agent of the State is the Act of the State.[45]

(C) During the trial, over the objection of defense counsel witnesses for petitioner were excluded from the court room. The trial court cannot, consistently with due process of law, exclude from the court room witnesses for the defense after witnesses for the prosecution already had testified and had been present during the testimony of each other (R. 100).[46] It did not provide a fair trial.

(6) The trial court divested petitioner of right to a fair and impartial trial by allowing prosecutor to illegally elicit from petitioner's wife damaging and prejudicial testimony on matters not concerned with the case (R. 142). Wife of petitioner could not be cross-examined on matters not germane to her examination in chief.[47] Especially where purpose of questions was to cast suspicion.[48] Such unfair method causes the trial to result in a miscarriage of justice.[49] It denies due process of law.[50] Failure to object is irrelevant. This Court notices errors to which no exception has been taken if they would "Seriously affect the fairness, integrity, or public reputation of judicial proceedings."[51] The transgression on petitioner's rights was more than a denial of fundamental concepts of justice; it was an indictment against the whole nation, for it is contrary to the established standards of procedural due process.[52]

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44 Ex parte Virginia, 100 U. S. 339, 347; 14th Amendment.

45 Ex parte Virginia, supra.

46 Sec. 145, Clark, Handbook on Crim. Proc., P. 489.

47 1 Wharton, Crim. Ev. (10th Ed.) Sec. 480, Chap. 9, p. 992.

48 Gale v. People, 26 Mich. 157.

49 People v. Cahoon, 88 Mich. 456.

50 Palko v. Connecticut, 302 U. S. 319, 325, 327; Berger v. United States, 295 U. S. 78, 89.

51 U. S. v. Atkinson, 297 U. S. 197; Johnson v. U. S., 63 S. Ct. 555.

52 14th Amendment and its interpretations.

The unfairness was increasingly intensified by the trial judge in his partial instructions to the jury (T. 154, 155) lacking in elements of due process, made the whole trial *ad nauseam*.

7 The trial court denied petitioner due process by admitting in evidence prejudicial statements by an interested police officer and a biased, disgruntled bank employee.

(A) Prejudicial remarks by witness Pellegrom, a bank employee (31), divested petitioner of a fair trial. Even if stricken, and the jury cautioned not to be influenced thereby, its effect could not be obviated.[53] Pellegrom inferred that petitioner had changed his name whenever the occasion called for it, thereby poisoning the minds of the jurors and its affects could not be erased from their memories, made the trial unfair.[54] Trial judge must protect rights of the accused, failed. Failure of counsel to object cannot be imputed to petitioner. For a defendant is not responsible for omissions of counsel upon whom he must rely.[55] Nor is the accused, under the circumstances, required to make motion to strike out unfair matter. Allowance of inadmissible testimony vitiates verdict of jury, and a commitment made thereon is therefore without force.[56] Pellegrom's remarks were deliberately designed to pollute the ears of the jurors, for the record is absolutely barren of any fact to show where Edward Bentz, petitioner's brother, ever used the name of "Craig". And a trial, wherein the court permits prosecution to take untair advantage of accused, is grossly lacking in elements of due process, invalidates jurisdiction.

(B) Testimony of police officer DeWitt (88, 89) deprived petitioner of a fundamental right to remain silent, was highly prejudicial and unfair. For petitioner could not have answered DeWitt's allegations without taking the witness stand. Moreover, the trial court failed to determine, without presence of jury, whether or not alleged

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53 People v. Wolcutt, 51 Mich. 612.

54 State v. Rothschild, 68 Mo. 52.

55 People v. Durrant, 116 Cal. 179.

56 Reg. v. Gibson (Eng.), 7 Am. Crim. Rep. 171, 173.

admission of having travelers' checks was voluntarily made after the constitutional requirement was spoken by DeWitt — which, of course, was not. DeWitt could not be a direct witness. He could not be a witness at all, unless defendant had taken the witness stand. The State cannot ignore its own judicial interpretations.[57] A deprivation of a right deemed fundamental by law invalidates proceedings had, and any mandate arising therefrom is made without jurisdiction, has been established.

(8) The trial court divested petitioner of a fair trial by admitting in evidence matters not concerning the facts of the case. As before stated, the stipulation was invalid.[58] The prosecutor, breaking the terms of it, introduced in evidence two bundles of photostatic copies of travelers' checks allegedly in possesssion of the bank on the 18th of August 1933, claimed they were stolen during the robbery (75-78). In his instructions to jury trial judge admitted this evidence was incompetent (R. 159). Prosecution could not show corpus delicti of crime thereby. For there was no proof to show petitioner ever had possession of them.

The testimony of witness Evans (R. 81-84) was evidence of another crime, without the jurisdiction of the trial court, could *not* be used to show, or have jury presume, the corpus delicti of crime was eventuated or that petitioner participated therein.[59] If the accused is not tried in accordance with the established canons of law, due process is not satisfied.[60]

(9) The trial court divested petitioner of notice and opportunity to defend, among other things, and transcended its jurisdiction.

(A) Petitioner was charged by information with the crime of "bank robbery" under Sec. 531, Act 328, Public

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[57] People v. Courtney, 179 Mich. 137.

[58] Young v. U. S., 315 U. S. 259.

[59] Sec. 150, Underhill, 3rd Ed. Crim. Evidence.

[60] Twining v. New Jersey, 211 U. S. 78, 101; Butler v. Perry, 240 U. S. 328, 333.

Acts of Michigan for 1931. He is sentenced and committed to prison for the crime of "robbery armed" under Sec. 529, Act 328, supra. Failure of information to charge offense for which prisoner is sentenced invalidates both conviction and sentence.[61]

(B) Information fails to comply with rule of "ejusdem generis", contrary to requirements of law.[62]

(C) Testimony offered by prosecution shows four or five men participated in the offense. Information charges petitioner with having committed it alone, and not with aid of someone else. The act of the State in so charging constitutes a variance between the pleadings and proof.[63] These matters had not arisen until during the trial. Petitioner had been denied notice of them. Thus it was impossible for him to make an objection thereto prior to the trial. The State, through its courts, denied petitioner process as construed by its own judicial decisions,[64] and the trial court had denied him of notice and opportunity to meet the unexpected. Measured by this standard, what conclusion follows? Petitioner's conviction obtained contrary to the State's own decisions, by virtue of denying him the necessary relief, is in violation of the United States Constitution. For, as shown, if the State insists its law be complied with, the citizen charged and held for

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61 People v. Frencavage 231 Mich. 242; People v. Brown, 299 Mich. 1, 4, 5; People v. Eger, 299 Mich. 49, 55 & 56, and People v. Ept, 299 Mich. 324.

62 People v. Brown, supra; Gooch v. U.S., 56 S. Ct. 595; 3 C. L. Mich. 1929, Sec. 17259.

63 1 Wharton, Crim. Ev., 10th Ed. 279; People v. Quider, 172 Mich. 285.

64 United States v. Ashe, 2 F. (2d) 735, wherein the court said: "We know that the state can go very far in exercise of its sovereign power, in the passage of laws regulating procedure, evidence, and methods of trial, not in conflict with the federal constitution.

"(4, 5) These powers, and very many more, some of which are summarized by Justice Moody in the case of Twining v. New Jersey, 211 U. S. 78, 29 S. Ct, 14, 5 L. Ed. 97, the state in the exercise of its sovereignty may lawfully exert, and the laws and modes of procedure which the state establishes, every citizen thereof is bound to obey. To him they become 'the law of the land.' As was said by Chief Justice Waite, in Walker v. Sauvinct, 92 U. S. 90, 23 L. Ed. 678, 'Due process of law in process in the states is regulated by the law of the state.' From the duty of the citizen to insist that the state comply with its own laws, and to demand, in the language of the Constitution of the state, that he be not deprived by the judgment of his peers or the law of the land."

a crime may also insist that the State comply with its own laws.[65]

(10) The trial court divested petitioner of due process by permitting the prosecution to infer before the jury that petitioner was known as a suspected criminal because his picture was in a police rogue gallery, while petitioner was never before convicted for a felony. The State cannot, consistently with due process of law, divest an accused of a fair trial by unholding an invalid conviction obtained in a trial during which prosecutor created prejudicial error (R. 148) by arguing matter of which there was no evidence.[66] While the prosecutor is at liberty to strike hard blows, he is not at liberty to strike foul ones.[67] Objection was timely made and was overruled (R. 147-148). The "foul blow" was intensified by the trial judge's remark that it was "a legitimate argument".[68] Where prosecuting attorney comments on matters not in evidence, the conviction may be voided.[69]

(11) The trial court divested petitioner of a fair trial when it disregarded the rules of evidence in connection with its instructions to the jury — by making discriminatory remarks regarding petitioner's alibi witnesses and by giving undue prominence to the State's side of the case.

(A) In his charge the trial judge cannot, consistently with due process of law, refer to the accused as an aider and abetter when such is not charged in the information.[70] (R. 150).

(B) DeWitt's testimony, because of its inadmissibility, required trial judge to exclude it from his in-

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[65] United States v. Ashe, supra.

[66] Sec. 172, Clark, Handbook on Crim. Proc. p. 539-541; People v. Allen, 299 Mich. 242.

[67] Berger v. United States, 295 U. S 78.

[68] People v. Fielding (N.Y.) 11 Am. Crim. Rep. 88, 97, wherein the court said that "approval of prejudicial remarks by a trial judge intensifies the effect."

[69] Clark, Handbook on Crim. Law & Proc., Sec. 172, pp. 539-541; People v. Reid, 295 Mich. 574, 575.

[70] 1 Wharton, Crim. Ev. 10th. 279; People v. Quider, 172 Mich. 285; Meister v. People, 31 Mich. 98, 111.

structions to the jury (R. 152). Failure to exclude it divested petitioner of a fair trial.

(C) The trial judge, already having deprived petitioner of a fair trial through the many illegal sanctions to the prosecution's foul methods, intensified the prejudicial atmosphere again by referring to the term "cash" in his instructions (R. 152), contrary to the established concept of due process in Michigan.[71]

(D) The trial judge cannot, consistently with due process of law, give undue favoritism to the testimony of the State's witnesses against him and omit mention of State's testimony favorable to petitioner (R. 152-154).[72] Nor can the trial court disregard the force of testimony given by alibi witnesses whose testimony showing petitioner innocent was not discredited. No part of the charge to jury can be designed or worded to the prejudice of the accused in a criminal case.[73] Infringement upon the rule which forbids courts to give undue prominence to particular facts, or a particular branch of the case, falls short of due process.[74]

(E) After the jury had retired to deliberate their verdict, and had been out an hour, the unprecedented occurred. They wanted answered a question, a question that was for them to determine and not of the province of the court (R. 157-162). The spokesman for the jury said, "We can't understand why they should be marked a date of issue August 30, 1933, before the date they were stolen" (R. 156). The prosecution charged the bank was robbed on August 18th. The foreman of the jury obviously meant the travelers' checks were issued prior to August 18th. With irreparable unfairness to petitioner the trial judge, in so many words, told the jurors it was only necessary to consider and decide one side of the case relative to its

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71 People v. Lintz, 244 Mich. 611.

72 Underhill, 3rd Ed. Crim. Ev. 435, stating "* * * the court must not select and give undue prominence to certain parts of the testimony to the exclusion of others of equal importance, but which do not seem as important to the judicial mind.

73 Glasser v. U. S., 62 S. Ct. 457.

74 Campbell v. People, 109 Ill. 565.

essential elements, and that "the date was blank and everything was blank," on the copies of travelers' checks (R. 158). The word blank was not in evidence. The trial court cannot include in his instructions matter of which there is no evidence. Thereupon the trial judge reopened the case to allow an interested witness for the prosecution answer the question, contrary to procedural due process and contrary to the statute providing documentary evidence be accompanied by an authorized representative to identify it (R. 161).[75] Witness Bolt was not an authorized representative for the banks to which the travelers' checks belonged. The trial judge transcended his jurisdiction by invading the province of the jury, for he had no right to discuss with them matters which they alone must decide.[76] His opinion could sway the jurors, and did in this case, depriving petitioner of a fair trial. Because of the transcendency of jurisdiction of the trial court during the trial and in subsequent proceedings, made it imperative for the State appellate court to order the corrective measures. Since the appellate court of the State failed to act, ignored applicable decisions of this Court, as well as its own, review by this Court is necessary.[77]

(12) The State through its appellate court has denied petitioner rights provided by the Constitution and this Court's interpretation thereof.

After the trial judge had arbitrarily denied the motion for a new trial, it was imperative for the state appellate court to review the case and render its opinion. The appellate court of the state refused to hear the matter at all, denied petitioner leave to appeal, contrary to its own judicial interpretations as to what constitutes a reversible error. Petitioner, supported every question raised with imperative authority. Both facts and law, requiring that justice be served, were ignored and the applicable

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[75] Sec. 14249, C. L. Mich. 1929.

[76] Starr v. U. S. 153 U. S. 614; Hicks v. U. S. 150 U. S. 443; Weare v. U. S., 1 Fed (2d) 617, and see Lisenba v. Calif., 62 S. Ct. 280.

[77] Brown v. Mississippi, 297 U. S. 278, 286.

decisions of this Court were disregarded *in toto*.[78] Petitioner was left with no alternative but to resort to a collateral attack by *habeas corpus*, since the ground, upon which it is based, as shown, is in accord with the decisions of this Court.[79]

2.

(Point Two)

The Michigan Supreme Court has decided Federal Questions in this cause in a way not in accord with applicable decisions of this Court.

(1) This Court recognizes that jurisdiction of the State to sustain a commitment is lost, and will issue its writ of certiorari, where, like here, proof is shown that generally the proceedings at the trial and subsequent thereto were so grossly lacking in elements of fairness and justice as to result in depriving petitioner of due process of law.[80]

That petitioner is imprisoned under a judgment invalid because obtained in violation of procedural guarantees protected against State invasion by the Fourteenth Amendment is patent by the record, among other things, tendered therewith. For the State has

(1) disregarded the law of the land;

(2) deprived petitioner of his liberty without due process of law;

(3) denied him equal protection of the laws;

(4) denied him confrontation of witnesses;

(5) suppressed evidence and denied him compulsory process for obtaining witnesses in his favor by withholding information of them;

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[78] Brown v. Mississippi, supra; Powell v. Ala., 287 U. S. 45, 57-59; Glasser v. U. S., 315 U. S. 60, 69; McNabb v. U. S., 317 U. S.—, 63 S. Ct. 614; Tumey v. Ohio, 273 U. S. 510, 535; et al.

[79] Mooney v. Holohon, 294 U. S. 103; Pyle v. Kansas, 317 U. S. 213; Waley v. Johnston, 316 U. S. 101, 105; Walker v. Johnston, 312 U. S. 275; Holiday v. Johnston, 313 U. S. 342; et al.

[80] Smith v. O'Grady, 312 U. S. 334.

(6) divested him of a fair and impartial trial by disregarding the rules of statutory requirements, common law, and established doctrines of legal jurisprudence;

(7) illegally allowed against him evidence that compelled him to be a witness to refute it;

(8) divested him of notice and opportunity to defend;[81]

(9) denied him the right to have a jury of his peers adjudge the new evidence; and

(10) denied him the right to appeal. That the Michigan Supreme Court, ignoring its own precedents and the laws of the State, has refused to hear the matter at all is insuperable of the fact that despotic forces rather than sound legal judgment has unfortunately controlled the case in the State courts.[82]

If the State insists that citizens must obey its law, a citizen has the right to demand that the State itself, through its agents, follow the letter of its laws.[83]

(2) That the Michigan Supreme Court has decided federal questions in this case in a way not in accord with applicable decisions of this Court and has departed from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision.

Under established procedure in *habeas corpus* the state appellate courts are required, on any pretense whatever, to issue and hear a writ of habeas corpus where the petitioner claims his conviction is in violation of the Constitution.[84]

The fact that the State appellate court in this case made some remarks on its order denying the petition for writ of habeas corpus is not enough to satisfy the requirements. Where there has been shown that injustice was

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[81] Simon v. Croft, 182 U. S. 427, 436.

[82] Chambers et al. v. State of Florida, No. 195, 60 S. Ct. 472.

[83] Walker v. Sauvinct, 92 U. S. 90, 23 L. Ed. 678.

[84] Pyle v. Kansas, 317 U. S. 213; Smith v. O'Grady, 312 U. S. 334; Waley v. Johnston, 316 U. S. 101, and collated decisions.

done, appeal becomes essential; the appellate courts must recognize such.[85]

Habeas corpus is not a discretionary process, but a matter of right, requires the court before which it is brought to act and not disregard it as unfounded of claim until the writ itself has been issued and the matter given due judicial inquiry. No court can foresee the merit behind an application for *habeas corpus* without inquiring into the case, fully, as the law provides, as this Court has repeatedly pointed out.

The remarks of the State appellate court on its order refusing to issue and hear a writ of habeas corpus in this case are unfounded. For petitioner, though perhaps regularly charged with a crime, was not lawfully convicted of the crime for which he was tried. It is questionable whether the court of judgment ever had jurisdiction of both person and subject matter at the outset of the proceedings. Notwithstanding such a question, the court of judgment unquestionably lost its jurisdiction during the proceedings in this case.

Irregularities in the trial of a case may not sustain issuance of *habeas corpus*. But where, like here, "the trial is conducted in such manner that is 'shocking to the universal sense of justice' and/or 'offensive to the common and fundamental ideas of fairness and right' " and where, like here, subsequent proceedings have been conducted in a despotic and over-zealous manner not in accord with the concepts of justice, this Court recognizes that due process of law has been denied, and that the judgment of the State against the petitioner is void.[86]

The State appellate court has not recognized the fact that review on *habeas corpus* is not limited to the record of the trial court, as is the case with appellate review, but on the contrary, evidence, *dehors* the record, is admissible. It may consist of oral testimony, depositions and

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[85] Brown v. Mississippi, 297 U. S. 278; Hopt v. Utah, 110 U. S. 574, 583; Simon v. Croft, 182 U. S. 427. 45 L. Ed. 1165. In the latter case, this Court held one charged with crime has sufficient recourse to offer new evidence in support of his innocence, must be observed.

[86] Palko v. Connecticut, 302 U. S. 319, 325, 327.

documentary evidence, in addition to the record of the trial court. Nor has the State appellate court recognized that appeals in habeas corpus proceedings are *sui generis,* in that findings of fact of the court of first instance are not conclusive, but are open to reconsideration on appeal, which to that extent is in effect a trial *de novo.*

That petitioner has already on two separate occasions been allowed to present to the trial court a belated motion for a new trial, and in each instance the motion was denied, is immaterial. That denial of his second motion for a new trial petitioner sought leave to appeal to the State appellate court and was denied and that he sought certiorari to the Federal Supreme Court is, also, irrelevant as to whether the writ of habeas corpus should have issued from the State appellate court.

If the state courts are arbitrary and refuse to grant any sort of relief, regardless of the procedure upon which such relief is sought, and the Federal Supreme Court was required to deny the certiorari heretofore because the appeal was not filed within the time provided by law (*Bentz v. State of Michigan,* 64 S. Ct. 33, 85), what bearing would that have now upon the case where the State has all along and still is holding petitioner illegally imprisoned? Only this: It manifesty shows that the State has all along and still is disregarding the United States Constitution in connection with this case and conducting justice contrary to the applicable decisions of this Court.

CONCLUSION

From the evidence submitted and the allegations and questions raised through the state courts, it is particularly deducible that a sinister force was deliberately put in motion to deny this petitioner fairness and justice as guaranteed by the Constitution by consistently and wilfully denying him relief when the new evidence was brought to light fully exonerating him of the crime. This, together with the flagrant disregard of all semblance of impartiality, the complete neglect to adhere to due process, the absolute aberration from rules of evidence, the wilful disregard for the latitude permitted in "instructions" by

interjection of bias personal opinions, seething with virrulent prejudice, tended, and factually was shown, to make the trial nothing more than a mere pretense of one. Any official who is acquainted with the facts of the case, justly knows this petitioner was "framed" in the fullest sense of the term.

Common sense dictates, and the law is proof, that no guilty man would spend all available time in research of law and judicial interpretation for 12 years, determined to establish and convince the courts of his innocence, if he in reality were guilty. Common sense dictates, and fact and precedent is proof, that no guilty man would spend all available time in searching and probing over 12 years for new evidence to further corroborate his innocence, if he in reality were guilty. In 12 years there has come to light *not* one shred of evidence to substantiate the prosecution's claims. But since the trial petitioner has brought to light an overwhelming amount of evidence, in documentary and affidavit form, which proves beyond a shadow of doubt that he could *not* have been a participant in the crime for which he unjustly is invalidly imprisoned.

Is it not plain that the various actions instituted in this case were denied for the very reason that the trial court concurs in the view that petitioner is innocent of said charge, but that court has refrained from granting relief for bias reasons and in order not to confirm the unequivocal disregard for due process? When courts incline toward such a view justice becomes a hollow mockery. And American jurisprudence has taken one more milestone toward gradual alienation from the principles and rights embodied in the Constitution.

When allegations become truth, supported by facts, a court of law can hardly refute them by a mere gesture without incurring suspicion of being despotic and bias. Past adjudications herein have visibly displayed a feeling of animosity and surging prejudice on the part of the trial court, intermingled with a seemingly superimposed fallacy of conceit and the opinion that "defendant must be guilty otherwise he wouldn't have been identified". This de-

ceptive opinion of the trial court does not meet the facts which glaringly show that the three persons who identified this petitioner have contradicted themselves, wilfully misstated the facts of the case and falsified their testimony to an unbelievable extent. It is hardly conceivable that the tactics used by the State in this case could be construed as having any comparable semblance of American justice.

But how does such contentions affect the jurisdictional question? A rational connection between facts proved and facts presumed, and the comparative convenience of producing supposed evidence of the ultimate fact, are not independent tests of the validity of the whole proceedings. The controlling interpretation here follows that not one iota of actual evidence was before the court and that the trial generally was so grossly lacking in the elements of fairness and justice that the resultant finding of guilt by the biased tribunal was grave departure from elements of due process, a transcendency of jurisdiction on the trial and during subsequent events, and a flagrant violation of procedural rights protected against State invasion by the Fourteenth Amendment.

It is hardly conceivable that a trial court would indulge in a tendency with law enforcement officers to suppress evidence and to search out a way to circumvent constitutional guarantees to obtain and sustain this unwarranted conviction.

The affidavits, letters, and confession of Edward Bentz naming all participants and describing in detail the conspiracy as well as the robbery, fully corroborated by Doyle, checked by the Michigan State Police, together with other, new conclusive evidence tendered therewith, prove beyond the pale of the most skeptical persons that petitioner was convicted upon fabricated hearsay and designed testimony, constituting a false jurisdiction, sustained by flimsy, incompetent and unverified testimony, neither proper nor in harmony with the dignity of American jurisprudence, substantially show that petitioner's conviction was obtained without due process of law. The fact that the State denies him the right to have this evidence decided by a jury

of petitioner's peers is, among the numerous claims made herein, a *prima facie* proof that the State has failed to observe the applicable decisions of this honorable Court.

When jurists of state courts allow their own personal opinions to replace the law of the land and the decisions of this Court, it is self-evident that they have shirked their duty and have weakened the great pillars of wisdom upon which our American system of jurisprudence rests.

Unless the liberty-loving and clear-thinking justices of the highest tribunal of this great nation, those who still cherish and revere the Constitution and believe wholeheartedly in the original American principles for which our sons gave their lives, are willing to combat the despotic forces who are gradually undermining the very foundations of freedom, we may expect to see personal liberty crucified, judicial usurpation of our courts, political emasculation of the people, the order of the day, in a country where personal liberty sat enthroned, a grand and glorious example of the crushed and down-trodden people of the earth.

A reversal of the conviction and sentence in this cause is not only necessary but absolutely imperative if the Constitution and applicable decisions of this Court are to be upheld. Otherwise another feather will be placed in the laureated crown of disintegrating justice.

THEODORE BENTZ,
Petitioner, Pro Se.

Dated this 3rd day
of June, 1946.

Business Address:
Theodore Bentz, No. 46144,
Marquette Branch Prison,
Lock Box 779,
Marquette, Michigan.

ORDER

AT A SESSION OF THE SUPREME COURT OF THE STATE OF MICHIGAN, Held at the Supreme Court Room, in the Capitol, in the City of Lansing, on the *first* day of *April,* in the year of our Lord one thousand nine hundred and forty-six.

Present The Honorable

Henry M. Butzel,
Chief Justice,

Leland W. Carr,
George E. Bushnell,
Edward M. Sharpe,
Emerson R. Boyles,
Neil E. Reid,
Walter H. North,
Raymond W. Starr,
Assiciate Justices.

In the Matter of

433801/2

Theodore Bentz.

This is an application for habeas corpus by Theodore Bentz, alias Craig. In 1934, he was found guilty by a jury in the Circuit Court of Ottawa County, of committing robbery armed. He was given a life sentence and is now confined in the branch prison at Marquette.

Review of the voluminous record discloses that petitioner was regularly charged and lawfully convicted in a court of competent jurisdiction. The penalty imposed was within the law. Petitioner does not raise any question as to the trial court having had jurisdiction both of the person and subject matter of the case. Instead he goes much into detail as to various matters which he claims were irregularities in the trial of his case, and in particular that the verdict of the jury was not sustained by the proof. Even if petitioner's contention in any of

these respects is well founded, it does not constitute ground for granting habeas corpus. Instead his present petition sets forth only such claimed irregularities or errors as would constitute a basis for a motion for new trial. Petitioner has already on two separate occasions been allowed to present to the trial court a belated motion for a new trial, and in each instance the motion was denied. From denial of his second motion for a new trial in 1943 Bentz sought leave to appeal to this Court. His application was duly considered and denied. Thereafter he sought on two occasions certiorari to the Federal Supreme Court. In each instance his application was denied. While he has designated the present proceedings as an application for habeas corpus, clearly it is nothing more than an attempt to have this Court now review denial in the Circuit Court of his application for a new trial. He has not made any showing which would constitute a ground for granting habeas corpus.

Upon careful consideration of the present proceedings it is ordered and adjudged that the relief sought in plaintiff's petition be and the same is hereby denied.

STATE OF MICHIGAN—ss.

I, Jay Mertz, Clerk of the Supreme Court of the State of Michigan, do hereby certify that the foregoing is a true and correct copy of an order entered in said court in said cause; that I have compared the same with the original and that it is a true transcript therefrom, and the whole of said original order.

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the seal of said Supreme Court at Lansing, this 2nd day of April 1946

(SEAL) (Sgd) Jay Mertz, Clerk.

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CHARLES ELMORE CROPLEY
CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1946

THEODORE BENTZ,
Petitioner,
vs.
THE STATE OF MICHIGAN,
Respondent.

No. 247

APPLICATION FOR CERTIORARI TO THE SUPREME COURT OF THE STATE OF MICHIGAN

BRIEF IN REPLY TO RESPONDENT'S BRIEF

THEODORE BENTZ, No. 46144,
Petitioner, Pro Se.
Business Address:
Lock Box 779,
Marquette, Michigan.

AMERICAN BRIEF AND RECORD CO., GRAND RAPIDS, MICHIGAN

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1946

THEODORE BENTZ,
Petitioner,

vs. No. 247

THE STATE OF MICHIGAN,
Respondent.

APPLICATION FOR CERTIORARI TO THE SUPREME COURT OF THE STATE OF MICHIGAN

BRIEF IN REPLY TO RESPONDENT'S BRIEF

OPPOSING PETITION FOR WRIT OF CERTIORARI

(Figures in parentheses refer to pages of printed record unless context clearly indicates otherwise)

May it please the Court:

Comes now Theodore Bentz, petitioner, in the above entitled cause, to reply to a certain number of respondent's unfounded assertions:

(I)

"COUNTER-STATEMENT OF MATTERS INVOLVED"

Obviously counsel for respondent is not familiar with all the facts and law applicable to this case. On page 2

of his brief he alleges petitioner was represented by "competent" counsel during trial.

It is not a question of whether counsel was "competent". It is a question of whether counsel protected petitioner's rights deemed fundamental by the Constitution. The fact remains that petitioner's trial attorney carelessly allowed the case to go to trial without preparing therefor. The record is *prima facie* evidence of that.

Courts must recognize matters of record. In order to complete the jurisdiction of the trier court, counsel must be prepared or demand time within which to acquaint himself with facts, evidence and issues involved in the case. Otherwise the concept of due process is not satisfied.

On the same page, respondent's counsel, exploiting subterfuge, plainly attempts to cast aside habeas corpus procedure as if the privilege of habeas corpus is not available by alleging "the doors of the trial court are never closed to a convicted person who seeks a new trial, * * *." He infers blandly that a motion for leave to file a motion is the key to those doors. Granted, if one has the key to fit the locks, and the trial judge jams the mechanism thereof, what good is the key?

Respondent asserts "lengthy investigation" was made prior to Dec. 31, 1938. By whom? Investigation made by Lieut. P. L. Hutson of the Michigan state police in the matter, result of which proved favorable to petitioner, was "pooh-poohed" by the trial judge when he considered the first motion.

Four years later he wrote Commissioner Olander of the Michigan state police who replied: "While alive, Lieut. Hutson mentioned several times that he did not believe Ted Bentz (petitioner) was in on the Grand Haven bank robbery" (See p. 104, New Evidence). This, too, was given neither credence nor recognition by the pertinacious trial judge, notwithstanding its eminent source.

On page 5, respondent alleges the state court "observed petitioner did not raise any question of jurisdiction of person or subject-matter; * * *."

Where a convicted person claims divestation of a right deemed fundamental by Constitution, it is not necessary for him to set out — in lengthy detail — that the trier court was without jurisdiction of person or subject-matter. For the court before which he is tried to deny, divest, curtail, abridge or fail to protect a constitutional right of the accused is sufficient to nullify its jurisdiction.

Moreover, whether petitioner "made any showing which would constitute a ground for granting habeas corpus" is no answer. Under the statute in Michigan and its own interpretations thereof as well as under the federal code and that of several states, the State courts must first issue the writ and then decide the matter according to its merits. To deny a petition for habeas corpus without issuing the writ is not the purpose of the procedure. Nor is it due process. For no jurist, no matter how much his law clerks have told him, can legally determine habeas corpus until he issues the writ and personally delves into the facts and subject-matter, including record and new evidence, together with evidence, if any, *dehors* the record.

(II)

"QUESTIONS PRESENTED"

Respondent under this caption sets out two questions. Answer to the first is that the State has not afforded petitioner with "the privilege of habeas corpus". But has, rather, obtundly denied him relief without so much as issuing the writ to ascertain whether the aggregate claims constituted a jurisdictional inquiry. Consequently, a violation of the U. S. Constitution.

The answer to the second question is that it appears the supreme court of Michigan shirked its duty to carefully read and examine the "voluminous" documents to sift out the merits in the matter. Unfortunately, there are among those serving the public men who often frown upon a laborious job. And, to alleviate the labor facing them, fall into the habit of circumventing the thing by mere adversative, dissident opinion. In his application for habeas corpus addressed to the supreme court of Michigan, petitioner set forth a host of grounds to justify granting of a writ of habeas corpus.

(III)

"COUNTER-STATEMENT OF FACTS"

On page 6 of respondent's brief, counsel annotates the erroneous theory that petitioner "may have had benefit of disbarred counsel *intra muros*, * * *". Petitioner denies such inference. Not being up to his usual standard when having prepared his procedure, petitioner would certainly welcome the privilege of being brought before this honorable tribunal to argue law and facts in the case in person.*

* See page 39, printed petition.

(1)

"PRETRIAL PROCEEDINGS"

Matter of counsel already has been discussed. Petitioner did not allege that the information failed to charge a crime. He claims the information fails to charge the offense for which he is sentenced (See p. 30 printed petition). You cannot try a person for one crime and sentence him for another. However, it appears to be common practice in Michigan.

It is significant to note that during the preliminary examination DeWitt, as friendly with the prosecutor as two guys in the same kind of trouble, was a hostile witness toward the defense, withheld evidence and deliberately obstructed justice (28). During the trial, having had ample time within which to alter the descriptions to fit the prosecutions requirements, DeWitt blandly offered to produce them (131). This is merely one example of how the prosecution cunningly circumvented the genuine facts.

(2)

"STATE'S TESTIMONY"

Although at the close of the People's case (133-134) the prosecutor offered to produce other witnesses whose names appeared on the information, save those out of state, he carefully avoided mention of producing witnesses of the *res gestae*.

"EYE-WITNESSES"

The record is evidence of the fact that each "eye-witness" who identified Theodore Bentz as being one of the participants in the robbery *did not* tell "much the same story." The witnesses appallingly contradicted each other and, hazarding the perils of perjury, testified from their conception of the thing, identifying 6-foot Theodore Bentz because they had been induced to believe that it was he whom they saw when, in fact, they first had seen 6-foot Edward Bentz, who entered the bank with 5-foot two Lester Gillis. When Edward turned into Bolt's office, disappearing from their view, they saw in his place 5-foot nine Charles Fisher who, with 5-foot eleven Tom Murray, followed Edward Bentz and Lester Gillis into the bank, while 5-foot six Earl Doyle remained outside the rear door, according to Edward's lengthy affidavit signed in 1940 (See Exhibit "A" page 31).

Fisher, the new evidence shows, walked past the grille work, spoke to Martha Meschke, then walked over to the "east" wall desk where he apparently remained during the holdup. In the meantime, shows the new evidence, Murray stood near the front door and then walked over to Auditor Lindemulder's window, at which point he presumably gave orders to Lindemulder and Mrs. Sargent to lie down (Exhibit "A" pp. 31-32).

Theodore Bentz is a victim of mistaken identity being mistakeningly identified first for Ed, and then for Charles Fisher. Ed, having quickly disappeared into Bolt's office, confused these witnesses who assumed that Fisher was one of the first two men to enter the bank.

When the picture of Theodore Bentz was first shown to said bank employees, according to what Lieut. Hutson later disclosed, it was presently singly — not with others as the respondent would have you believe. Later, however, it was again presented among a number of pictures. Prior thereto, Edward Bentz's picture had been presented singly. He was positively identified by Bolt and others from the outset.

How do we explain that fact that Theodore Bentz's picture was singled out as a possible suspect? Two weeks after the robbery was perpetrated, the "get-away" car was found abandoned. In the pocket thereof officers found a drivers license. Lieut. Hutson, who was in charge of the investigation of the case, traced it to Edward Bentz who resided in Long Beach, Indiana, under some assumed name. When Hutson arrived there, of course Ed had fled. Thereupon Hutson sought out relatives who lived in nearby Michigan City, arrested one of them and "frightened him almost to death," by threatening to charge him with the crime if he wouldn't talk. This relative gave what information he could, investigation shows, and told Hutson that Theodore Bentz had visited with Edward a few days before the robbery occurred. Thus Lieut. Hutson suspected that Theodore Bentz might have been involved. Hutson forthwith obtained a picture of Theodore Bentz.

Whether said relative was able to give Hutson any information of Edward's accomplices is indicated by the fact that Hutson brought a picture of Lester Gillis into the bank shortly after the car was found. Gillis, as the new evidence shows, was the bandit who held up Welling. He, first to enter the bank with Ed, carried a "machine gun in a basket" (See Exhibit "A").

"WILLIAM H. PELLEGROM": This witness, as well as the others who identified Theodore Bentz as being one of the robbers, admittedly saw in the local newspaper a picture of petitioner before "they" identified him at the jail.

There are a host of cases, including the late Bertram Campbell case in New York, where bankers have thoughtlessly pointed a finger at an innocent person and positively declared him to be the man who committed or participated in the crime, only to discover, years later, he was not the man at all when another person confesses to the offense. In the Campbell case, one banker out of four who identified Campbell stubbornly refused to repudiate his identification even after Alexander D. L. Thiel who looked almost enough like Campbell to be him had confessed and "positively proved" that he and not Campbell committed the crime. Governor Dewey, the man who prosecuted Campbell, pardoned him.

It is significant to note that punctual Frederick Bolt, cashier of the bank in this case, did not identify Theodore Bentz. Nor did Lindemulder. Nor did a host of other witnesses who were present during the perpetration of the holdup.

Although Bolt, under cross-examination (78-81), testified he did not see the first two robbers enter the bank, he did see them after they once got inside. Reason he could not identify Theodore Bentz was because Theodore Bentz was *not* one of the bandits.

Lindemulder, like all other bank employees, saw *all* of the bandits in the bank. His testimony indicates this (85), where it is self-evident that his subconscious mind functioned to the reply before his conscious faculty had checked it. Said he: "I saw four, no, I didn't see four, I saw one, two, I saw two of them" as they came in and saw them again when he was outside. It is completely obvious that he had been coached. But why did not he identify Theodore Bentz? It so happens that Lindemulder, like Mr. Bolt, had some scrupulosity.

It should be borne in mind that every witness who identified Theodore Bentz as being one of the participants was an interested witness: thus inclined to satisfy the prosecution. The overzealous prosecutor, whose political ambitions have since proved to have existed at the time, had exactingly directed his witnesses prior to the trial as to which of them were to identify Theodore Bentz and where to place him in the bank, as the record flagrantly shows. Consequently, could any accused person obtain a fair trial under such a cabal arrangement?

(3)

"DEFENSE TESTIMONY"

Respondent failed to apprise this Court that both the prosecuting attorney and the trial judge brow-beat alibi witness Bailey. Bailey, being the first time in his life he appeared in a court room as a witness, was deliberately obfuscated by the exacting and shouting, leading questions of the prosecutor (106) took undue advantage of him.

Despite the prosecutor's artifice, Bailey's testimony was not discredited. Evidence shows petitioner hadn't moved into the apartment building where Bailey saw him until August 16th. Testimony elicited from Bailey by prosecutor to effect that he may have seen petitioner on August 11th was spoken under duress and while Bailey was confused. Bailey saw petitioner on Aug. 18th 1933 for the first time in his life and that was the last he saw of him until the trial. He remembered he got his pay check the following day for work he did in petitioner's apartment. The check was dated August 19th (99, 141). The apartment building's record confirmed that Bailey worked in petitioner's apartment only during the 18th day of August 1933.

Aaron Shugan (109-122) and Charles L. Knuth (122-133), who both testified on behalf of petitioner, were positive they saw petitioner in their store on August 18th, and that medicine petitioner purchased — rarely sold to a man — left a vivid impression of petitioner's visit in their minds as of that day. Their testimony was not shaken.

Petitioner's wife, Christina, who was born and reared in Scotland by religious parents, testified that petitioner was with her in the Chicago apartment when the crime in question occurred in Grand Haven, Michigan, more than 200 miles away (138-145). Her testimony is plain and truthful, was not discredited, despite the embarrassment under which she was placed. At her the prosecutor cast unwarranted aspersions.

And the fact that Earl Doyle testified (133.135) that he took part in the robbery, was acquainted with the identity of his associates in that robbery, and that Theodore Bentz was not one of them, is direct proof of not only petitioner's innocence but of the fact that he is a victim of mistaken identity. New evidence accquired since the trial fully corroborates the defense testimony, and yet the State has denied petitioner the right to have this evidence decided by a jury of petitioner's peers.

IV.

"ARGUMENT"

"Point One"

It is common practice in Michigan to deny a writ of habeas corpus on the pretense that one's remedy is by a belated motion for a new trial which is granted or denied at the discretion of only one, presumably the trial judge. If he — to speak frankly — does not feel like granting the motion, despite the merit of the points upon which it is based, he simply denies it. In his opinion, he can be as arbitrary as he may choose, not infrequently misstating facts. The procedure, in any case, does not preserve the constitutional right of movant to be treated in accordance with the law. Nor does it compare to the protection provided by habeas corpus. Nor does a discretionary appeal to the state appellate court from denial of a motion for a new trial safeguard rights deemed fundamental. For, if a convicted person cannot appeal as a matter of right, or, if he cannot obtain from the state appellate court a proper review, and is denied certiorari by the highest court in the land on a technical point of time, what other remedy might he seek save habeas corpus? Thus respondent's argument in this connection is not tenable.

Conceded, petitioner exhausted state remedies by belated motion for new trial, and attempted to get the State appellate court to review the arbitrary denial. But the fact remains that no court, except the trial judge, has ever reviewed this case and rendered a constituted opinion on the questions presented. Constitutional issues have been invariably disregarded. A bland, unsupported denial, made at the glance of one appellate court judge, is not just. Nor does the movant get any protection against the whims of that judge where the case is denied without review. How could petitioner be satisfied with anything but a just decision? Must an innocent person lie down and allow arbitrary courts to violate rights deemed fundamental and keep him in prison when such person has substantially proved his innocence and the fact that his trial was unfair?

When our forefathers framed the Constitution they fully intended that star chamber methods be absolutely discarded. Yet in this case, the state courts have virtually gone back to the reign of England's Charles the 1st to administer justice. No recognition has been given to the new evidence in this matter, nor does the respondent discuss it in his brief. If the law had been followed in rendering an opinion in this matter, there would be no need now to invoke the jurisdiction of the highest tribunal of the land. Since the State refused to follow the established doctrines of law, petitioner's course was clear. Either an innocent person can or cannot get justice in these United States. The question is substantially before the Court by virtue of the manner in which the questions presented are framed.

On page 20 of his brief respondent meekly asserts that "although several witnesses identified him as one of the robbers, he did not take the stand to deny the accusation." An accused person on trial must follow the advice of his attorney. He is not responsible for omissions of counsel upon whom he must rely. What right has the respondent to now disparage the doctrine that an accused person remaining silent is presumed to be innocent until proved guilty by competent evidence and before an unbiased jury in a court of qualified jurisdiction?

In Michigan, an accused person appears in the eyes of administrators of justice to be guilty if arrested for a crime, "otherwise he wouldn't have been arrested in the first place". And, if he does not take the witness stand, the untrained legal minds — and even many of the trained ones — suspect he is hiding behind a cloak of legal technicalities. A plea of *not guilty* is, under the law, sufficient to constitute a denial of any allegation made by the prosecution.

Respondent's unctuous assertion that petitioner filed a delayed motion for a new trial and was permitted to argue it, and had attempted to obtain a review of the denial in the State appellate court, only goes to show the *modus operandi* of the state courts in this cause has been superficial and a guise to make the public believe justice is being served.

Petitioner respectfully submits that respondent has failed to show where petitioner's first question doesn't have merit.

"Point Two"

Under this point respondent (21) hollowly declares that "there is no substance to any of the points raised in the petitioner's application to the court below for a writ of habeas corpus." A careful scrutiny of the facts and issues involved and the cases cited by petitioner show no "distorted notion" of his several grounds upon which he bases the two federal questions here presented.

The rules of this Court plainly state it is not permissible in an application for certiorari (or habeas corpus) to argue legal propositions where the matter is discussed in the supporting brief. The Court has repeatedly rebuked counsel for exploiting a petition for such purpose, since the purpose of the petition is merely to set out the claims and showing the court's right to exercise its jurisdiction to determine the merits of those claims. Thus "naked" legal conclusions in the applications itself, when argued by brief, is quite the proper procedure. And, as a matter of fact, all claims made by petitioner in his "application" are supported either by record or evidence or by *dehors* the record (See petitioner's printed petition page 19).

Since the remaining matters set out under this caption in respondent's brief are sufficiently covered by petitioner's brief supporting petition for certiorari, additional argument is unnecessary.

V.

"CONCLUSION"

Habeas corpus is available to an imprisoned person at any time, according to Constitution. Whether he has been confined for ten years or fifty is absolutely irrelevant. The Constitution provides that the States cannot abridge the right of the people to petition the Government for redress of grievances and that the privilege of a writ of habeas corpus cannot be suspended. Respondent State has refused to recognize these rights in this case. And has, un-

fortunately, disregarded the applicable decisions of this Court in rendering its opinions against petitioner's every legal move as well as in the administration of justice.

The purpose of the law is to maintain order, to advise people what is right and what is wrong. The purpose of the courts is to determine who is right and who is wrong, and such determination must be by due process of law. But where courts disregard the laws and their established interpretations and the judicial decisions of this Honorable Court, the course of this tribunal when called upon to order the corrective measures becomes clear. Otherwise the purpose for which this Court was founded will have failed by its mere reluctance to act in a situation which affects, by its far-reaching consequences, not merely this humble petitioner alone but those of impeccable character of high office who might one day find themselves in a like predicament with no manner in which to vindicate their innocence.

Petitioner, by virtue of all that has been presented here in this Honorable Court in this case, respectfully submits that the writ of certiorari should be issued accordingly.

Respectfully submitted,

THEODORE BENTZ,
Petitioner, Pro Se.

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IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1946

No. 247

Theodore Bentz, **Petitioner,** **v.** **The State of Michigan,** **Respondent.**	**Application for certiorari to the Supreme Court of the State of Michigan.**

Brief Opposing Petition for Writ of Certiorari.

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Brief Opposing Petition for Writ of Certiorari.

I

Counter-Statement of Matters Involved.

Petitioner seeks a writ of certiorari to review an order of the supreme court of the State of Michigan, entered on the 1st day of April 1946, denying him a writ of habeas corpus to inquire into the legality of a judgment of the circuit court for the county of Ottawa convicting him of robbing a bank while armed (Michigan Penal Code, § 531 [Mich. Stat. Ann., § 28.799]).[1]

The record discloses that the attorney general objected to the issuance of the writ for the reason that the questions for

[1]

The order from which appeal is sought appears on pp. 42 and 43 of the printed petition for certiorari and supporting brief, and it is in substance an opinion per curiam setting forth the reasons for denying a writ of habeas corpus.

decision were adjudicated on the 6th day of April 1943,[2] when the Michigan supreme court denied the petitioner leave to appeal from the judgment aforesaid, and again on the 19th day of May 1943 when the court below denied reconsideration of its first order.

All of which appeared from the following chronological statement of court procedure:

Sept. 25, 1934, followed a trial by jury in which he was represented by competent counsel, petitioner was convicted of the offense of robbing a bank, while armed, and he was sentenced by the judge of the circuit court for the county of Ottawa to serve a term of life imprisonment.

Jan. 17, 1936, leave having been granted him, the petitioner filed in the circuit court a delayed motion for a new trial.[3]

Dec. 31, 1938, after a lengthy investigation and hearing, motion for new trial was denied in a written opinion.[4]

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[2]

See record transmitted to this court by the court below in Bentz v. Michigan, 320 U.S. 706; rehearing denied, 320 U.S. 812.

[3]

It should be noted at once that under the laws of the State of Michigan as interpreted by its highest court, the doors of the trial court are never closed to a convicted person who seeks a new trial, and this regardless of any statutory period of limitation; the power to permit the filing of a motion for new trial is inherent. People v. Bernstein, 261 Mich. 534. And it is for this reason, if no other, that writs of habeas corpus are not allowed to function, in Michigan, as a writ of error, on the theory that the delayed motion for new trial affords an adequate and complete remedy.

[4]

That opinion is probably attached to the petition of Theodore Bentz for a writ of habeas corpus. If not, it appears in the record transmitted to the clerk of this court with the petition for certiorari in Bentz v. Michigan, 320 U.S. 706.

Dec. 18, 1942, the petitioner having again obtained leave filed his second delayed motion for new trial.

Dec. 28, 1942, the petitioner was brought into court on a writ of habeas corpus *ad testificandum* and he argued his motion orally.

Jan. 4, 1943, his second motion for new trial was denied by the court in a written opinion, a copy of which was attached to his petition for habeas corpus in the Michigan supreme court.

Feb. 9, 1943, the petitioner filed in the supreme court of Michigan an application for leave to appeal based on a concise statement duly certified by the trial judge and accompanied by a great volume of documents, transcripts of testimony, excerpts therefrom, and a lengthy brief (Mich. Supreme Court Cal. No. 42384-½).

April 6, 1943, the court below denied the petitioner's application for leave to appeal.

April 24, 1943, petitioner filed in the court below a special motion for reconsideration of the foregoing order denying him leave to appeal, on the ground, *inter alia,* that the supreme court of Michigan had overlooked the fact that he was appealing from the denial of his several delayed motions for new trial.

May 19, 1943, petitioner's motion for reconsideration was denied by the court below.

Oct. 11, 1943, this court in a *per curiam* opinion, denied petitioner's application to review the decision of the Michigan supreme court for the reason that application therefor was not made within the time provided by law, citing § 8 (a), Act of February 13, 1925 (43 Stat. 936, 940), 28 U.S.C., § 350. *Bentz v. Michigan,* 320 U.S. 706.

Oct. 25, 1943, this court denied petitioner a rehearing thereon. 320 U.S. 812.

The attorney general pointed out that the pending petition of Bentz for habeas corpus was accompanied by copies of the same transcripts of testimony and other records which he had presented to the court below and to this court in 1943; that Bentz was assigning in his petition for habeas corpus the same reasons and grounds for relief that he had set up in his application for leave to appeal from the order denying his delayed motions for new trial, reclothing them in constitutional phraseology; he called attention to the fact that petitioner's voluminous brief in support of his application for the writ of habeas corpus debated much the same points as those raised in the former proceeding; and he expressed the opinion that petitioner's remedy was by way of appeal, arguing that since the petitioner had pursued it to an unsuccessful conclusion he might not renew it in an application for the extraordinary writ of habeas corpus. Therefore, the petition for a writ of habeas corpus should be denied.

In what amounted to a *per curiam* opinion,[5] the court entered an order denying the relief sought. Review of the voluminous record disclosed to the court that petitioner was regularly charged and lawfully convicted in a court of competent jurisdiction. The penalty imposed was within the law.[6]

---

[5]
See pp. 42-43 of the printed petition for certiorari.

[6]
This disposes of the contention (printed petition, pp. 10, 30-31) that the information failed to charge the offense for which the prisoner was sentenced, petitioner intimating that there are some fine lines of distinction between the robbery of a bank and robbery while armed.

The court observed that petitioner did not raise any question of jurisdiction of person or subject-matter; that instead he went much into detail as to various matters which he claimed (and still claims) were irregularities in the trial of his case, 'and in particular that the verdict of the jury was not sustained by the proof'. Such claimed irregularities or errors might constitute a basis for a motion for new trial but they would not constitute ground for granting habeas corpus. Petitioner had already on two separate occasions been allowed to present to the trial court a belated motion for new trial, and in each instance the motion was denied. From denial of his second motion for a new trial in 1943 Bentz sought leave to appeal; his application was duly considered and denied; in each instance he sought certiorari from this Court and was denied (320 U.S. 706 and 812). And, the court concludes:

> "While he has designated the present proceedings as an application for habeas corpus, clearly it is nothing more than an attempt to have this court now review denial in the circuit court of his application for a new trial. He has not made any showing which would constitute a ground for granting habeas corpus".

II

Questions Presented.

1. Where the laws of a State as interpreted by its highest judicial authority, grant to one convicted of crime the right to apply for permission to file a belated motion for new trial to review and consider questions of fact and law arising, inter alia, from a claim that rights guaranteed by the Constitution of the United States have been violated, and where it appears that such a remedy has been sought with the result that the privilege has been fully exercised though relief is denied, and that the supreme court of the State,

after due consideration of the entire matter, has denied an appeal, can it be said (on application to the supreme court of that State for writ of habeas corpus, raising identical questions) that such a State has denied due process of law?

2. Did the petition of Theodore Bentz addressed to the supreme court of the State of Michigan, set forth any ground for the granting of a writ of habeas corpus?[7]

We respectfully submit that each of the foregoing questions should be answered 'No'.

III

Counter-Statement of Facts.

The record transmitted by the court below consists of (1) the petitioner's application for a writ of habeas corpus and supporting brief, comprising a single volume of 93 pages;[8] (2) a transcript of the complaint and information, the magistrate's preliminary examination, the testimony taken during the trial with a list of calendar entries;[9] and (3) a

---

[7]

It would be next to impossible to set forth all of the premises to this question, but they will be considered in this brief, though in a somewhat summary fashion.

[8]

Although petitioner appears in propria persona it is apparent from the excellent diction employed that he may have had the benefit of disbarred counsel intra muros, a common practice in Michigan penal institutions.

[9]

The transcript is awkwardly page-numbered; the transcript of the preliminary examination appears as pages 1 to 32, incl., while that of the continuance of such examination comprises additional pages 1 to 3; the testimony of the trial starts apparently on page 40 and runs through to page 205, the numbers being at the bottom-center of each page. In this brief, however, numbers in parentheses refer to bracketed numbers appearing at the right of the bottom of each page commencing with the testimony of William H. Pellegrom, the State's first witness.

document of 109 pages captioned 'True and Correct Copies of the New Evidence acquired since the Trial'.

From all of which the following facts appear:

1

Pretrial Proceedings.

On the 20th day of August 1934 a circuit court commissioner acting as magistrate conducted a preliminary examination to determine whether in his opinion there was probable cause to believe that Theodore Bentz was guilty of the crime of robbery charged in a written complaint on file in his office. The State was represented by the prosecuting attorney of the county, while the respondent was represented by an attorney of good repute in the community, who closely cross-examined the eye-witness who had identified Bentz as one of the bank robbers.[10]

Three days later the magistrate, having found probable cause therefor, bound the respondent over for trial at the September term of the Ottawa county circuit court.[11]

Whereupon, under date of September 20, 1934, the prosecuting attorney filed his information charging in substance that on the 18th day of August 1933 at the city of Grand

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[10]

It should be noted that petitioner was at all times throughout these criminal proceedings represented by counsel of his own choice. His first attorney withdrew from the case and other competent counsel took his place.

[11]

It has never been claimed by petitioner, or either of his counsel, that there was not sufficient evidence to justify the finding of probable cause, or the magistrate's return which bound the respondent over for trial.

Haven in the county of Ottawa, State of Michigan, had then and there committed the criminal offense of bank robbery, while armed.[12] And the calendar entries (167) reveal that on the same day the respondent waived reading of the information and pleaded not guilty to the offense therein charged.[13] He also gave notice of alibi (not published).

The cause came on to be heard before the circuit judge on the 24th day of September 1934, the transcript disclosing that John R. Dethmers, prosecuting attorney, appeared on behalf of the State, and that Elbern Parsons, an attorney of great repute, appeared as counsel for the respondent. There were no preliminary motions,[14] but a jury was at once called, examined and sworn, and the prosecuting attorney made an opening statement. The first witness was then sworn (1) and testified (1-32).

2

State's Testimony.

Eight witnesses whose names were indorsed on the information, (iii) testified on behalf of the People,[15] six of

[12]

The information sets forth with particularity all of the elements of the offense therein charged: the intent to commit larceny; the threat to kill, maim, wound or injure with dangerous weapons, certain enumerated persons; the putting in fear; the stealing of bank property.

[13]

Since respondent had heard the testimony adduced at the preliminary examination, he was well aware of the nature of the accusation.

[14]

No motion for a continuance; no motion for a bill of particulars; no motion to quash the information on the ground that the preliminary examination did not reveal sufficient evidence to bind over for trial.

[15]

Two of these, William H. Pellgrom and Lawrence DeWitt, had testified at the preliminary examination.

whom were present in the bank or its immediate vicinity when the robbery occurred; of those, four:

William H. Pellegrof, an assistant cashier of the bank in question (1-31),[16]
Martha Meschke, its savings teller (32-40),
Arthur Welling, its commercial teller (41-60),
and
Charles Bugelski, an assistant manager of a store located directly across the street from the bank (60-70),

positively identified the respondent Theodore Bentz as one of the robbers, while two such eye-witnesses:

Frederick C. Bolt, the bank's cashier (71-81),
and
John Lindemulder, its auditor (84-88),

could not identify Theodore Bentz because they did not see him.

Of the remaining two witnesses:

George Evans, an employe of a clothing store at Hammond, Ind., identified Theodore Bentz as one who on August 29 or 30, 1933 presented a traveler's check for $20 in payment for a hat which he purchased at said store (82-84), and

Lawrence De Witt, chief of police of the city of Grand Haven, Mich., testified (88-94) concerning certain statements made to him by Theodore Bentz.

At the close of the People's case (94-95), the prosecuting attorney offered to produce other witnesses whose names

[16]
Reference numbers in parentheses are to parenthetic numbers appearing to the right of each page of the testimony taken at the trial.

appeared on the information, and he informed the court (95) that others not present were not in the state.

Eye-witnesses:

Each eye-witness who identified Theodore Bentz as one of the participants in the robbery told much the same story: he was present when the robbers entered the bank and throughout the entire transaction; he described just what part Theodore Bentz had played; he related what opportunity he had to observe Theodore Bentz and the other robbers; he had identified the respondent from a picture which he saw shortly after the date of the offense, and he had selected that picture from among many; no one had indicated to him which of these pictures he should select; and he had not been coached.

A brief summary of the testimony of one of these witnesses will suffice for the present purpose:

William H. Pellegrom testified that he was assistant cashier of the People's Savings Bank of Grand Haven, a Michigan banking corporation, and that he was so employed on the 18th day of August 1933 (1), being then and there engaged in his duties. He then testified (using a floor plan of the bank as an exhibit) to the details of the robbery (2-14), which occurred about three o'clock that afternoon, the bank's closing time; four men participated (2). Aside from one named Doyle, this witness since the date of the robbery had also seen one of the first of the bandits to enter the bank (14).

This man, later identified as Theodore Bentz (15-18), stood near a wall-desk, and the witness had opportunity to observe him until the bank employees were ordered to 'lay on the floor'; he next saw him at the county jail, and after that 'at the hearing here' (15), that is at the examination.

'I am looking at him right now', said the witness (16), 'the man seated to the left of Mr. Parsons here'; he knew that he 'is one of the men'; that is, the man that the witness described as walking back to that wall desk; he was positive he was the man, there being no particle of doubt in his mind. He didn't see how he could be mistaken.

That man the witness saw at the wall desk in the bank is Theodore Bentz (17).

Previous to the time that the witness saw Theodore Bentz at the county jail, the officers showed him some pictures for the purpose of identifying these men, and he did make such identification, including 'this gentleman here and his brother Ed; I always supposed it was his brother, they tell me it is his half brother'. Quite a number, maybe three dozen, pictures were shown him (17), though he would not say positively, there must have been two or three dozen anyhow; they had a book there with pictures in it and he went through it; in addition to that he saw two or three dozen pictures that were not in the book. This was two or three weeks after the robbery (18).

Closely cross-examined (18-30; 31-32), this witness testified (18) he pointed out a picture of the respondent, they did not tell him so. 'When I see a man's picture, why your picture or my picture, I know whether it is you or isn't you. I am not blind. They showed him a lot of pictures and (18) he pointed out one of them and said 'this is one of the robbers'. And defendant's counsel continued to test the credibility of this witness in a skillful manner.

So much for the witnesses who identified the respondent as one of the robbers. Those who could not, testified as follows:

Frederick C. Bolt testified (71) he was cashier of the bank on the 18th day of August 1933 and that he was present in the bank when the robbery occurred; he was standing at his desk when the first thing he knew Ed Bentz, whom he later identified, was around the corner of the door to his office and had a gun 'right in my middle'. No one else came into his office, and he was unable to identify anybody else except Ed Bentz and the 'little fellow that has not yet been identified', though he felt (72) that if he saw his picture or saw him that he could identify him. He saw only three of the four men that day, and that is why he could not identify Theodore Bentz.

This witness then testified regarding the cash, the bonds, and the travelers' checks of the Mellon National Bank and of the American Express Company that were stolen by these robbers (72-78), and numerous exhibits were received in evidence.

On cross-examination (78-81), Mr. Bolt testified he didn't see the fourth one of these robbers; he saw three. He did not see the first two come in at all.

John Lindemulder, the bank auditor, testified (84) he was working in the bank on the day in question and he remembered the bank robbery that occurred there.

He stated (85) he was working on a 'little rent problem' with a Mrs. Sargent, and he noticed nothing unusual until somebody hollered 'back up' when, looking through the glass, he saw a large man come crouching through, pointing a pistol at Mr. Bolt, and the next instant there was one pointing at him. 'They' then ordered them to put up their hands and lie on the floor, which they did (apparently with some alacrity). This witness did not see the two men that came in and went to Mr. Welling's window, and he had never identified the respondent Bentz, nor did he see him that

day. 'I saw four', said the witness, 'no, I didn't see four, I saw one, two, I saw two of them' (85) as they came in, and he saw them again when he was outside. Later, he identified a man by the name of Edward Bentz, and one, Doyle, being the only two he ever saw. He did not identify Theodore Bentz because he did not see him. He had a good opportunity to see Edward Bentz and Doyle but not the other two of the men (86).

On cross-examination (86-88), Lindemulder testified he did not know if the men he saw were the ones that came first into the bank, but they were the first he saw. He understood that the two he didn't see were the two that came into the bank first; and possibly he didn't notice them because he was engaged in business with a lady who was standing in front of him (86), and the mathematical problem at hand took his attention; therefore, he did not see the transaction that Mr. Welling had, or see him lie down on the floor, though he was to the witness' right about 12 feet; what transpired there would be beyond his vision. He thought at the time there were more than he himself had encountered (86-87).

On redirect (87), this witness stated he had lost the sight of one eye in the War.

When the State rested (95), counsel for the defense made no motion for a directed verdict.

3

Defense Testimony.

Counsel for the defense then made his opening statement (96) to the effect that it was respondent's claim that the People's witnesses were mistaken in their identification of

the respondent; that on the day in question the respondent was, at the time the robbery was being committed, in the city of Chicago, at an apartment, which witnesses would identify and testify to; that he was not in the city of Grand Haven but in the city of Chicago, and therefore could not have committed the robbery in question.

Lonnie Bailey, a resident of Chicago, testified (96-100) he was living there in August 1933; that he knew the respondent Craig or Bentz; that he saw him for the first time on August 18, 1933, in the afternoon, in a kitchen apartment beneath a drug store run by a Mr. Shugan, at 7905 Luella avenue, Chicago (97).

The witness at that time was engaged in cleaning the apartment; he stopped work at 12:00, went back at quarter to 1:00 and quit at 4:30 o'clock. He was employed by Mrs. Rhodes, agent of the building, and in charge of that particular apartment (97). The nature of the work in which witness was employed was cleaning floors, walls, windows, the tile in the bath room, just general cleaning. In this apartment there was a bedroom, living room, a dinette and kitchen all combined (98).

When Bailey came to clean that day, he found Mrs. Craig and her husband (the respondent), and he started in working immediately. He saw the respondent there in the living room while he worked in the apartment from the time he started at 3:15 until 4:30 p.m. The respondent and his wife were there; she was fixing lunch (98), but he didn't notice what she was doing the rest of the time, since he was busy. The respondent talked to him a lot while he was working (98-99).

August 18 that year was Friday, and the witness got his pay, in the sum of $7.12, the next day, which was Saturday. He got it downstairs in the drug store (99). He did not see

the respondent any more after that, but whoever was in possession of the establishment at that time was the man that stayed around there, and the witness identified him as the respondent (100).

On cross-examination (101-107), this witness testified he had been working in the apartment building for six years (101-102). Before Mrs. Rhodes had charge, George Heilback paid him. He worked somewhat irregularly, and he usually got paid on Saturday. The check he cashed in the drug store on the occasion in question, was given him by Mrs. Rhodes. He had had some checks since then, but he didn't have much work, and he didn't know the date. He had no recollection of the date, Friday, August 11th; he hadn't kept track of everything he did. He worked at different places, 'but to come down to the dates of the buildings, I don't keep track of' (103).

He hadn't any particular dates, 'but the agent has all the different dates, has all the records'. He couldn't say definitely what days he worked in August last year (1933) 'because', he said (104), 'I don't keep the dates; she keeps the dates'. He did not know what days in August 1933 he worked in that apartment building. He saw Bentz once there, had not seen him anymore, only that one time he saw him there; he didn't see him the day before. He had worked there a couple of days; after that he 'just fiddled around' (105).

And the prosecuting attorney continued to test the credibility of this witness (104-107) and his memory for dates, a cross-examination that culminated in the following:

> "**Q.** Then explain to the jury how you know it was the 18th you saw Mr. Bentz there in that apartment?
>
> **A.** How I saw? Well I was working in the apartment.

Q. How do you know it was on the 18th?

A. I was working on that day, that is why I know it was on the 18th.

Q. For all you know you were working the Friday before, that was August 11th. How do you know it wasn't August 11th you saw him in that apartment?

A. That could be true.

Q. And you only saw him there once, isn't that it?

A. Just once'' (107).

On further cross-examination (108-109), this witness testified that was the first and last time he saw Mr. Bentz. The only time he had to get a good look at him that day was when he looked, just once; he knew him from then on. He had never seen him before, but he was sure the respondent was the same man.

Other alibi witnesses,

Aaron Shugan, the proprietor of a drug store located in the Chicago apartment building referred to by the witness Lonnie Bailey, *supra*, who testified in substance that Theodore Bentz came to his store on Friday, August 18, 1933, to buy a paper and some medicine for his wife (109-122);

Charles L. Knuth, an employee of Shugan in the latter's drug store in the apartment building, who testified he saw Bentz in the drug store on the day in question (122-133); and

Christine Craig, the respondent's wife, who testified she was in the Chicago apartment with the respondent on August 18, 1933 (138-145),

were subjected to a thorough cross-examination for the purpose of testing their credibility and memory for dates.

Earl Doyle, one of the men involved in the bank robbery, and who was serving a prison term therefor, testified (133-135) he was acquainted with the identity of all of his associates in that robbery, having known them for a sufficient length of time previous to the robbery to identify all of them. Theodore Bentz, the respondent, was not one of such associates in that bank robbery on the 18th day of August 1933, and the witness had no personal interest in 'this man'.

On cross-examination (134-135), he had never seen Bentz before testifying. Four others accompanied the witness on the robbery, so there were five altogether. He refused to reveal who were the other four.

John DeKoster, of Grand Rapids, testified (136-138) that two or three months after the robbery occurred, Mr. Bolt, or one of the cashiers of the bank, told him that he, the witness resembled one of the robbers 'slightly'.

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Instructions of Court; Verdict and Judgment.

Thereupon the trial judge instructed the jury (149-157), and, upon request of their foreman, gave special instructions (157-160); Frederick C. Bolt was recalled as a witness to testify concerning certain matters regarding which the jury had inquired (160-162); and the jury returned a verdict of 'Guilty'.

The prosecuting attorney then moved that sentence be pronounced, and counsel for the defense stated he had no objections (162).

Questioned by the court, the respondent stated he had an objection, but he desired a private conference with the court first. That privilege was granted, and the prisoner and trial judge returned to the court room. The respondent then protested his innocence (163). He stated he had never robbed that bank; the court sentenced him to serve in the branch of the Michigan state prison at Marquette (164).

IV

Argument

Point One

The State of Michigan has granted this petitioner an adequate remedy by way of a belated motion for new trial to protect his Federal constitutional rights, and it has not denied him due process of law.

Under a leading decision of the supreme court of the State of Michigan,

People v. Burnstein, 261 Mich. 534,

any judge of a court of record has inherent power, regardless of statutory limitation, to order a new trial, or set aside a judgment in a criminal cause, on proper showing.[17]

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[17] The only limitation on such power is that a trial judge cannot exert it for the purpose of commuting the sentence imposed. People v Fox, 312 Mich. 577.

The court below has consistently held that the extraordinary writ of habeas corpus will not be permitted to function as a writ of error.[18]

It would seem to us, therefore, that Michigan's code of criminal procedure, as interpreted by the highest state judicial authority, affording as it does the privilege of moving for a new trial, and the further right, after lapse of the statutory period, to apply for leave to file a delayed motion for a new trial, followed by a discretionary appeal from a denial thereof, grants to a convicted person all of the privileges of a writ of coram nobis.

Save in the most extraordinary cases, this procedure is eminently fair, and it affords to State prisoners a means whereby issues of fact may be resolved, and questions of constitutional law determined as efficiently as though the supreme court of the State had issued its writ of habeas corpus.

The petitioner in this case took every advantage of the privileges afforded him; he twice applied for leave to file a motion for new trial, and that privilege was granted. He filed an application for leave to appeal from the denial of such motions, together with volumes of testimony and other documentary matter.

When the supreme court of Michigan denied him leave to appeal, the petitioner applied to this court for a writ of

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[18]

In re Palm, 255 Mich. 632; In re Gardner, 260 Mich. 122; In re Guilmette, 261 Mich. 684; In re Krusiewicz, 263 Mich. 74; People v Harris, 266 Mich. 317; In re Long, 266 Mich. 369; In re Van Dyke, 276 Mich. 32; In re Offill, 293 Mich. 416, 419; In re Brazel, 293 Mich. 632, 641; In re Stone, 295 Mich. 207.

certiorari to review such order, but the writ was denied on the ground that the application was tardy.

Bentz v. Michigan, 320 U.S. 706.

Not content with that decision, petitioner applied for a rehearing on his application for the writ, and this was denied (320 U.S. 812).

Still dissatisfied, the petitioner applied to the supreme court of the State for a writ of habeas corpus; the records disclose that the grounds of that application were identical to those raised in the former application for leave to appeal; the same identical mass volumes of testimony and other documents were filed with that application as were presented to the court on appeal, and to this court on application for writ of certiorari.

We respectfully submit that the State of Michigan has not deprived the petitioner of due process of law:

1. Petitioner was fully informed of the nature of the offenses charged (i).

2. He had competent counsel to advise him from the moment of his arrest until he was duly convicted.

3. He was tried by a jury in a court of competent jurisdiction and, although several witnesses identified him as one of the robbers, he did not take the witness stand to deny the accusation. His counsel used the art of cross-examination to test the credibility of the State's witnesses, and he adduced testimony from several witnesses in an attempt to establish petitioner's alibi. The jury decided the issue of fact and found him guilty.

4. He filed a delayed motion for a new trial and he was permitted to argue it. Upon denial thereof, he sought leave

to appeal to the supreme court of the State, and this privilege was denied after the high court had carefully reviewed and considered the voluminous record. And he waited too long before applying to this Court for a writ of certiorari.

For these reasons alone, we respectfully submit the court below did not err in denying the writ of habeas corpus.

Point Two

There is no substance to any of the points raised in the petitioner's application to the court below for a writ of habeas corpus.

Although it seems scarcely necessary we desire to discuss somewhat summarily the several grounds for relief on which the petitioner relied in his application for habeas corpus. Each is based upon a distorted notion of recent decisions of this Court collated in

Hawk v. Olson, 326 U.S. 271.

We take the liberty of assuming that all naked legal conclusions set forth in petitioner's application for habeas corpus, may safely be laid aside;[19] that constitutional claims not made in the court below,[20] though advanced

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[19]

E.g., the allegation of paragraph 4, A, p. 2 of the petition for habeas corpus, that 'The trial, conviction and sentence were not in conformity with the 5th or 6th or 14th Amendment to the Constitution of the United States', without specifying in what manner such constitutional provisions were violated.—Similar allegations appear in paragraph 4, B, D, E, and F, 2 and 12.

[20]

The claim, first asserted in petitioner's pending application for certiorari (printed matter, p. 12), that counsel for the accused had inadequate time to prepare a defense, and that petitioner was deprived of taking the witness stand by advice of counsel, was not made in the court below.

here, or points that involve purely local considerations,[21] may be disregarded; and that we may confine the discussion within the lines drawn in the Michigan supreme court.

1. Petitioner's first complaint set forth in his application for habeas corpus, is that the Ottawa county circuit court denied him due process of law, and disregarded a Michigan statute,[22] 'when it denied the petitioner the right to a new trial' on the ground of newly discovered evidence, 'which, on a retrial of the case, would result in a different verdict' (petition for habeas corpus, par. 4, F, 1, p. 3).

The granting of a new trial on the ground aforesaid lies within the sound discretion of the State trial court, and this Court has never interfered therewith.[23] If the trial court abused such discretion, petitioner's remedy was by way of appeal to the State supreme court. That remedy was sought without results, and petitioner should not be permitted to raise the question on habeas corpus.

2. Petitioner asserts (petition for habeas corpus, par. 4, F, 3, p. 3), that:

> "The Ottawa county circuit court denied petitioner equal protection of the law by allowing him to be convicted on testimony which was shown to be fabricated, pre-arranged and outlined by the prosecution".

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[21] Petition for habeas corpus, par. 4, F, 4, p. 4.

[22] Allowing the court in its discretion to grant a new trial on specified grounds. 3 Comp. Laws Mich. 1929, ss 17354-17355.

[23] United States v. Johnson, 90 L. Ed. 389.

That point is stated in the brief filed by petitioner in this Court (printed petition, p. 7), but it is not urged in argument.

Such an unsupported allegation is not equivalent to saying that 'conviction was obtained by the use of perjured testimony knowingly used by the prosecuting officials and the trial court'.[24]

The question was discussed by petitioner in his application for habeas corpus, under the captioned statement ('Point Three', brief in court below, p. 26):

> "The State of Michigan denied petitioner equal protection of the laws by allowing him to be convicted by a jury contrary to the evidence in the case".

And it is quite evident that petitioner's conclusion that he 'was convicted on testimony which was shown to be fabricated, pre-arranged and outlined by the prosecution', is drawn from the testimony adduced at the trial, and that it is based upon his claim that 'the verdict of the jury was contrary to the evidence'.

This appears from his brief (filed below) in the following statements:

> "Only by inducement they were influenced to identify an innocent man, not the man whom they actually saw, as the evidence on the trial indicates and the new evidence positively shows" (p. 30, *id.*).

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[24]

Mooney v. Holohan, 294 U.S. 103, 112, declaring that the knowing use of material perjured testimony by a state prosecutor would make a trial unfair within the meaning of the Fourteenth Amendment. Cited in Hawk v. Olson, 326 U.S. 271, 275.

"Reasonable doubt prevails when witnesses for the State contradict each other and where their testimony, like in this case, is inconsistent" (p. 31, *id.*).

"Any reasonable thinking person would know that Miss Meschke *fabricated* her testimony when she stated she saw merely one bandit among four within the confines of a presumably small bank. Petitioner has never seen this bank. From the testimony, however, one may assume it is about 60 feet of length within" (p. 36, *id.*).

"Because the testimony of the only witnesses who identified petitioner is contradictory and inconsistent, *fabricated* and speculative, it creates a reasonable doubt of guilt. That doubt is intensified by the testimony of Bolt and Lindemulder who admitted petitioner did not participate in the holdup.[25] Further proof of reasonable doubt of petitioner's guilt was *established* by his alibi witnesses who testified that he could not have committed the crime because he was in Chicago during the very hour the bank was being robbed and that they saw him there" (p. 39 *id.*).

The argument, in fine, is simply this: the State's witnesses were utterly discredited by contradictions and inconsistent statements in their testimony; the alibi witnesses who testified that petitioner was in Chicago at the time of the robbery, told the truth and the prosecuting attorney was unfair in his attempts to confuse them as to the dates and time in question. Therefore, the State's evidence was 'fabricated'.

The answer is that the credibility of the witnesses, as well as all issues of fact, was for the jury.

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[25]

These witnesses did not state anything of the kind. They merely testified they could not identify the respondent because they did not see him. See our counter-statement of facts.

3. There are several allegations of error in the admission of evidence (petition for habeas corpus, par. 4, F, 5, 6, 7, 8 and 10). But these were duly considered by the circuit judge on motion for new trial, and by the supreme court on application for leave to appeal. And the answer is that in Michigan the writ of habeas corpus was never intended to take the place of a writ of error.

4. Fault is found in the charge of the court to the jury, but such assignments of error were duly presented to and considered by the supreme court in due course (petition for habeas corpus, par. 4, F, 11, p. 5).

V

Conclusion.

Unless it must be said that each prisoner in Michigan's penal institutions is entitled, after the lapse of 10 years, to a writ of habeas corpus to review his convictions merely because he alleges in his petition that rights guaranteed by the Fourteenth Amendment have been denied him, the petitioner in this case is not entitled to a writ of certiorari. Any thought to the contrary (entertained by such prisoners) arises from a misconception of the decisions of this Court.

1. This is not a case where the accused has been deprived of the effective assistance of counsel,[26]

Powell v. Alabama, 287 U.S. 45, 58;
House v. Mayo, 324 U.S. 42, 46;
White v. Ragen, 324 U.S. 760, 764,

[26]
Although he mentions the subject in his application for certiorari, petitioner did not raise the question of counsel in his petition for habeas corpus.

nor where a member of an oppressed minority has been tried in an environment of hostility amounting to mob violence,

Powell v. Alabama, supra.

2. Petitioner pleaded 'not guilty' and was tried; he does not contend that a confession was extorted from him or that he was subjected to physical abuse, or trickery,

Moore v. Dempsey, 261 U.S. 86;
Waley v. Johnston, 316 U.S. 101, 104.

3. There is nothing in this case that remotely resembles the situation in the recent Missouri convictions,

Tompkins v. Missouri, 323 U.S. 485,
Williams v. Kaiser, 323 U.S. 471.

We, therefore, respectfully submit that the writ of certiorari should be denied the petitioner.

Respectfully Submitted,

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